Supreme Court, U.S.
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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1995

ALICE SUE BROWN,

Petitioner,

V.

CAMPBELL COUNTY BOARD OF EDUCATION, LARRY BRINTON, JR., DIRECTOR OF THE DIVISION OF WORKERS' COMPENSATION, TENNESSEE DEPARTMENT OF LABOR, SECOND INJURY FUND, STATE OF TENNESSEE, and CHARLES BURSON, ATTORNEY GENERAL FOR THE STATE OF TENNESSEE,

Respondents.

On Petition for Writ of Certiorari to the Supreme Court of The State of Tennessee

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does Tennessee Code Annotated §§ 50-6-241 which sets out the methods for determining permanent partial disability benefits under Tennessee's Workers' Compensation Act, violate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution?

2. Does Tennessee Code Annotated §§ 50-6-241 and 50-6-242, Tennessee's Workers' Compensation Act, which distinguishes among claimants for permanent partial disability benefits on account of educational attainments violate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution?

3. Does Tennessee Code Annotated § 50-6-241 impermissibly conflict with the Americans with Disabilities Act of 1990, 42 U.S.C. § 701 et seq. or Section 794 of the Rehabilitation Act of 1973, 29 U.S.C. § 710 et seq.?

PARTIES TO THE PROCEEDINGS

Petitioner Alice Sue Brown ("Brown"), was an employee of Respondent Campbell Board of Education ("Board of Education"). The Respondent Board of Education operates the public schools in Campbell County, Tennessee, and was Brown's employer. Respondents Larry Brinton, Jr., Director of the Division of Workers' Compensation, Tennessee Department of Labor, Second Injury Fund, State of Tennessee, and Charles Burson, Attorney General for the State of Tennessee, collectively referred to hereinafter as "the State," are the Tennessee State officials charged with administering and defending the statutes whose constitutionality under the United States Constitution, and lack of fidelity to federal statute law, are being contested by Brown in these proceedings.

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Supreme Court of The State of Tennessee

PETITION FOR WRIT OF CERTIORARI

Petitioner Alice Sue Brown hereby petitions this Court for a Writ of Certiorari to the Supreme Court of the State of Tennessee.

OPINIONS BELOW

The Chancery Court of Campbell County, Tennessee issued an Order and Judgment filed on October 24, 1994 (Appendix ["App."] C); which found portions of the Tennessee's Workers' Compensation Act ("Act"), Tenn. Code Ann. §§ 50-6-241(a)(1), 241(b), 241(c), 242 "to be arbitrary, capricious, illegal, and unconstitutional because they violate the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution." The Tennessee Supreme Court on appeal filed its Judgment (App. A), and Opinion ("Opinion")(App. B), on December 28, 1995. The decision disapproved the chancery court decision that the relevant portions of the Act were unconstitutional, and rejected Brown's argument that T.C.A. § 50-6-241 impermissibly conflicted with the Americans with Disabilities Act of 1990, 42 U.S.C. § 701 et seq. or § 794 of the Rehabilitation Act of 1973, 42 U.S.C. § 710 et seq.

JURISDICTION

The Tennessee Supreme Court entered its Judgment (App. A), and Opinion (App. B), reversing the judgment of the Campbell County Chancery Court on December 28, 1995. This petition is thus filed within the time allowed by law. Supreme Court Rule 13.1, 13.4. Jurisdiction is invoked pursuant to 28 U.S.C. § 1257(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The **Equal Protection Clause** of the United States Constitution, Amendment XIV, § 1, provides in relevant part:

No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.

Tenn. Code Ann. § 50-6-241(a)(1),(b),(c)(Supp. 1995) (App. I).

Tenn. Code Ann. § 50-6-242 (Supp. 1994) (App. J).

Title 42 U.S.C. § 12101(2) (App. K).

Title 42 U.S.C. § 12131(2) (App. L).

Title 42 U.S.C. § 12132 (App. M).

STATEMENT OF THE CASE

Brown, was employed by the Board of Education as a cook (Amended Complaint in Civil Action No.: 13,417 (App. F ¶ 5). While working at the Jellico Elementary School ("School"), on October 6, 1992, Brown suffered injuries to her neck, left shoulder, left arm and upper back (Id. ¶ 5). As a result of this injury, which arose out of and in the course of her employment with the Board of Education, Brown was rendered disabled to work and earn wages, as well as incurring medical expenses (Id. ¶ 6).

Brown was injured again later that month upon her return to work. While working as a cook, Brown suddenly

slipped and fell, suffering serious and disabling injuries to her back, right hip, right leg, and other parts of her body" (Amended Complaint in Civil Action No.: 13,418; App. E ¶ 5). As a result of this injury, which also arose out of and in the course of her employment with the Board of Education, Brown was additionally rendered disabled to work and earn wages, as well as incurring medical expenses (Id. ¶ 6).

After these injuries, Brown was examined by Eugenio F. Vargas, M.D; that gentleman, a neurosurgeon, found "disc abnormalities" which did not require surgery (Opinion at 5; App. B at 10). As a consequence, the supreme court found, "Dr. Vargas found no objective indication that Brown had suffered a permanent injury as a result of the October 1992 work incidents" (Id.).

Dr. Durham was certain that Brown's "severe and chronic depression" (id. at 9), were aggravated by the two accidents (Id.) As the supreme court noted, however, "Dr. Durham could not provide a percentage of permanent mental disability under the AMA Guides because the Guides provide no such numerical percentages" (Id. at 9 to 10).

In addition, orthopedic surgeon William Kennedy "assessed an anatomical impairment rating of 21% to the whole body as a result of Brown's back and neck conditions" (Id. at 8)(footnote omitted). According to Norman Hankins, Ph.D., Brown's "vocational disability . . . is at least 95%" (Id. at 10).

Brown filed two complaints in the Campbell County Chancery Court. The first pleading, Civil Action No. 13,417

(App. H), was filed on August 23, 1993 with the Board of Education as the named defendant. The complaint sought benefits under the Tennessee Workers Compensation Law, T.C.A. § 50-6-101 et seq., for neck and other injuries suffered by Brown on October 6, 1992. The second pleading, Civil Action No. 13,418 (App. G), was filed on August 24, 1993 with the Board of Education as the named defendant. This complaint sought benefits for back and other injuries suffered by Brown in late October 1992. In each case Brown sought benefits from the Second Injury Fund, T.C.A. § 50-6-208, for her injuries.

Brown subsequently filed amended complaints on August 30, 1993 and October 13, 1993 respectively (App. F-E), adding Larry Brinton, Director of the Division of Workers' Compensation, Tennessee Department of Labor, the Second Injury Fund, the State of Tennessee, and Attorney General Charles Burson, as additional parties defendant for purposes of testing the constitutionality of the Tennessee Worker's Compensation Reform Act ("Act"). These parties will, as noted above, collectively be referred to as the "State." On December 6, 1993, the State moved for summary judgment on the ground that the Act was constitutional.

The trial court, after a hearing, issued an Order and Judgment (App. C), filed on October 24, 1994. The court found portions of the Act, T.C.A. §§ 50-6-241(a)(1), 241(b), 241(c), 242 "to be arbitrary, capricious, illegal, and unconstitutional because they violate the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution and unfairly discriminate between workers whose medical problems are recognized by the [AMA] Guides and

those whose problems are not, such as mental trauma and chronic pain syndrome" (Order and Judgment ¶ 11 at 3). See also Order and Judgment ¶ 14 (App. C at 43 to 45-46). In addition, the court below also found that "T.C.A. Section 50-6-242 is discriminatory on its face because it clearly and unequivocally discriminates in favor of uneducated workers as compared with educated workers" (Id. ¶ 11; App. C at 45). The court also found that the legislation was "illegal and unconstitutional because the statute also violates equal protection of the Fourteenth Amendment of the United States Constitution in that it provides workers who return to the same employment with less disability than those workers who do not return to the same employment" (App. C ¶ 13 at 46). The Act was also found to be unconstitutional "because the statute requires that the multipliers established by T.C.A. Section 50-6-241(a) and T.C.A. Section 50-6-241(b) are maximum limits [and] the ratings in the [AMA] Guides have nothing whatever to do with the inability to work" (Order and Judgment [App. C ¶ 15 at 47).

The State thereafter perfected its appeal as to both cases. The Board of Education did not appeal the Order and Judgment below.

REASONS FOR GRANTING THE PETITION

1. **This case presents a significant constitutional issue regarding whether a recent amendment to Tennessee's Workers' Compensation Law, affecting thousands of employers and employees in that state, denies equal protection to injured workers by discriminating between workers whose medical problems are recognized by**

American Medical Society Guides and those who problems are not so recognized. The statute under consideration, T.C.A. § 50-6-241, when "[r]educed to its essentials . . . establishes maximum permanent disability awards for employees based on the medical impairment rating and multipliers selected by the [Tennessee] legislature" (Opinion at 8-9; App. B. at 13 to 15). Brown objected to the constitutionality of this scheme on the ground

> that [statutory] use of the AMA Guides . . . violates equal protection because (1) numerical percentage ratings are not provided for certain medical conditions, such as mental impairment or chronic pain, (2) factors other than a physician's interpretation of anatomical impairment are not considered in determining vocational disability and, (3) the AMA Guides themselves caution against their exclusive use in fashioning awards of vocational disability.

(Opinion at 17; App. B. at 25).

A detailed examination of the statutory scheme demonstrates the need for such review. T.C.A. § 50-6-241(a) sets a maximum award of 2½ times the "medical impairment rating" if the employee returns to work with his pre-injury employer at the same or greater wage. Absent such a return to work, the maximum award is six times the "medical impairment rating." The important consideration is the means by which this "medical impairment rating" is determined.[1]

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[1] The 2½/6 multiplier is itself subject to attack on the ground that there seems to be no rational basis for the choice of those two figures.

Under the statute, "the medical impairment rating [is] determined pursuant to the provisions of the American Medical Association Guides to the Evaluation of Permanent Impairment." T.C.A. § 50-6-241(a)(1).[2]

The best evidence that use of the AMA Guides is arbitrary and capricious comes from the AMA Guides themselves.[3] The statute utilizes the AMA Guides to set disability awards. See T.C.A. § 50-6-241(a)(1). Yet the AMA Guides themselves point out that "impairment," which is what the AMA Guides deal with, and "disability," "which is the subject of the Act," are very different concepts:

> [W]hereas impairment is a medical matter, disability arises out of the interaction between impairment and external demands . . . Simply stated, "impairment" is

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[2] Among the sources of "the medical impairment rating" are:

> [T]he Manual for Orthopedic Surgeons in Evaluating Permanent Physical Impairment (American Academy of Orthopedic Surgeons), or in cases not covered by either of these, an impairment rating by any appropriate method used and accepted by the medical community.

T.C.A. § 50-6-241(a)(1). Brown's emotional injury and her chronic pain are items "not covered by either of these," id., so that the catch-all phrase is inapplicable here.

[3] There is no more compelling evidence that use of the Guides is arbitrary and capricious than that of Brown's own personal circumstances. She was emotionally injured to a severe degree and suffers from disabling chronic pain, but application of the AMA Guides provided her with benefits for those injuries of exactly zero.

> what is wrong with the health of an individual; "disability" is the gap between what the individual can do and what the individual needs or wants to do. An individual who is "impaired" is not necessarily "disabled" . . . [I]f the individual is able to meet a particular set of demands, the individual is not "disabled" with respect to those demands, even though a medical evaluation may reveal impairment . . . The physician does not determine industrial loss of use or economic loss for the purpose of paying a disability benefit.

AMA Guides at 1-2 (emphasis in the original).

As a result, even the AMA Guides themselves implicitly warn against the use to which they have been put by the Tennessee legislature. And if this implicit warning was not enough, the warning was soon thereafter made utterly explicit:

> We encourage each system not to make a "one-to-one" translation of impairment to disability, in essence creating a use of the Guides which is not intended.

AMA Guides at 6 (emphasis supplied).

This conclusion of unconstitutionality with respect to use of the AMA Guides in this case flows from a consideration of the purpose of worker's compensation, which was historically stated to be as follows:

> The primary purpose of these benefits is to replace some proportion of wage loss, actual or potential . . . cash benefits should be closely tied to [the disabled individual's] loss of income . . . Workmen's compensation should replace a substantial proportion of the worker's lost renumeration.

The Report of the National Commission on State Workmen's Laws 33, 36-37 (1972). But the vice of the Act is that it attempts to make "scientific" and a matter of mere formula that which is simply not amenable to such treatment. A reasonable reading of the statute entails that these factors are to be considered only if neither the Guides nor the Orthopedic Manual governs the particular injury. See Tenn. Code Ann. § 50-6-241(a)(1). Of course, the supreme court asserts a construction of the Act under which these additional considerations are to be considered in all determinations but where the use of the AMA Guides simply provides the maximum figure for a permanent partial disability award (App. C. at 45). Even if this reading were correct, the statute is hardly saved from unconstitutionality as a result. To argue that the use of traditional (and constitutional) factors to fix benefits in less than the maximum amount, coupled with a parallel (but unconstitutional) employment of the AMA Guides to fix the maximum award, somehow cures the arbitrary and capricious nature of the statute is to turn accepted standards of constitutional and statutory analysis on their heads. As a scholarly criticism of such attempts points out:

> Policy makers should appreciate that the search for an "objective," "accurate," or purely "medical" system is

> and always will be fruitless. And they must resist the seductive but false hope that use of a scientifically or medically authored ratings systems can bypass the need to make the hard choices necessary for any loss assessment.

Book review of Pryor, Ellen Smith, Flawed Promises: A Critical Evaluation of the American Medical Association's "Guides to the Evaluation of Permanent Impairment, 103 Harv. L. Rev. 964, 976 (1990)(footnote omitted).

But one need not resort to law reviews to find compelling criticism of such compensation schemes. This Court itself disapproved HHS regulations that would have linked child disability entitlement to a list of impairments:

> No decision process restricted to comparing claimants' medical evidence to a fixed, finite set of medical criteria can respond adequately to the infinite variety of medical conditions and combinations thereof, the varying impact of such conditions due to the claimants' individual characteristics, and the constant evolution of medical diagnostic techniques.

Sullivan v. Zebly, 493 U.S. 521, 539 (1990). The use of the AMA Guides pursuant to the Act partakes of precisely the same vice. Worker's compensation systems were designed as a sort of trade-off; workers lost their right to sue their employers at common law for their work-related injuries in exchange for a statutory scheme under which they would receive at least partial compensation for losses of earning capacity suffered as a result of such injuries. The difficulty

is that the Act under examination fails in this task; it offers compensation on the basis of impairment rather than on the more logical grounds of lost earning capacity, lost income, or actual disability. As the chancery court pointed out, a system that is so tenuously related to a worker's actual lost earning capacity or actual ability to gain employment is "arbitrary, capricious, [and] irrational" (Order at 5; App. C at 47). Such a system is arbitrary and capricious and should be declared unconstitutional by this Court by way of granting the Writ of Certiorari here being sought.[4]

Brown acknowledges the general validity of her supreme court's philosophy that if a particular distinction "is rationally related to a legitimate state objective, the legislation should be held to be constitutional." Civil Service Merit Board v. Burson, 816 S.W.2d 725, 734 (Tenn. 1991). Precisely the same principle obtains in this Court. Hooper v. Bernalillo County Assessor, 472 U.S. 612, 618 (1985) ("Generally, a law will survive [equal protection] scrutiny if the distinction rationally furthers a legitimate state interest").

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[4] Even those decisions from other states that have approved workers' compensation schemes that utilize the AMA Guides to some extent or in various ways have not gone so far as the State in this regard. The Texas Supreme Court, for example, upheld the constitutionality of its Workers' Compensation Act of 1989, Tex. Labor Code § 401.001 et. seq. (Supp. 1994), an enactment which shares some features of the legislation before this Court, in Texas Workers' Compensation Commission v. Garcia, 893 S.W.2d 504 (Tex. 1995). But the Texas court expressly did not reach the equal protection question actually before this Court. Instead, "[w]e express no opinion as to whether the Act might violate due course of law as applied to a claimant suffering from a permanent physical ailment that is not rated under the [AMA] Guides." Id., at 526.

The state supreme court simply went through the analytic motions in reversing the chancery court so as to find the statutory scheme to comport with the demands of equal protection. It did so by invoking a number of black-letter principles of law disfavoring judicial findings of unconstitutionality. It noted the well-established rule that a statute is entitled to a strong presumption favoring its constitutionality. It observed that any doubt should be resolved in favor of the constitutionality of a statute. It suggested that a court has an obligation to uphold the constitutionality of a statute if there exists any reasonable construction which would satisfy the requirements of the Constitution. Moreover, it placed the burden upon the party attacking the statute to show its unconstitutionality (App. B. at 31 to 32). No one could possibly contest the abstract truth of these principles. But their invocation in the present context does little more than beg the question in issue. The issue before the Court is whether, in fact, application of these principles can save the constitutionality of the statutes under examination. Brown contends that they cannot.

Under the rational basis test, according to the state supreme court, there are "no bright-line rules for determining reasonableness" (Opinion at 14; App. B. at 22). But the reasons that court does usher forth in support of the statute simply fail to bear sustained scrutiny. For example, the court argues that use of the AMA Guides actually reduces unequal protection in that "[t]he multipliers substantially reduce the possibility of similarly situated workers with like injuries and anatomical disability ratings receiving vastly different awards" (Id. at 16; id. at 24).

But no such rational relationship has or can be shown in fact. There is simply no compelling or even rational reason why the legislature had to discriminate against workers suffering non-AMA Guide covered injuries in pursuit of the principle that "[r]easonably (sic) uniformity in statutory awards is a legitimate state interest" (id.; id.). See, e.g., Eisenstadt v. Baird, 405 U.S. 438, 447 n. 7 (1972)("the statutory classification would have to be . . . rationally related to a valid public purpose") (emphasis by the Court); Tennessee Small School Systems v. McWherter, 851 S.W.2d 139, 153 (Tenn. 1993)(rational basis test asks "whether the classifications have a reasonable relationship to a legitimate state interest"). Nor is it possible to determine what "legitimate state interest," id., is served by its so doing, and certainly the State has shown itself unable to articulate any such interest. There is nothing so magical about the AMA Guides that requires their statutory incorporation even in the face of blatant discrimination against workers unfortunate enough to suffer injuries not explicitly covered by new statute. In short, the Court should, for purposes of assessing this Petition, be guided in its examination of the purported rationale for the statutory use of the AMA Guides by the rule that "the mere recitation of a benign, compensatory purpose is not an automatic shield," Weinberger v. Wiesenfeld, 420 U.S. 636, 648 (1975), against a searching equal protection analysis of the Tennessee statute.

The supreme court goes on in this connection to make a generalized plea that the legislature be allowed to have its way with this classification. Just a little discrimination never hurt anyone, it seems to say; and even if it actually does hurt its targets a little, such pain is unobjectionable because

"[e]qual protection does not require absolute equality" (Opinion at 13; App. B. at 21). The State then asserts, by coincidently echoing the familiar rule of Dandridge v. Williams, 397 U.S. 471 (1970), that "[e]qual protection does not . . . mandate that everyone receive the same advantages" (Opinion at 13-14; App. B. at 21). Brown by no means demands "absolute equality" (Id. at 13; id.). Nor does she demand that "everyone receive the same advantages" (Id. at 13-14; id.). What Brown does request of this Court is an appellate recognition by way of a grant of the Writ sought in this Petition that this discrimination does in fact offend the Constitution.

As the discussion both above and below demonstrates, this statutory scheme has many constitutional vices. Chief among them, and the primary reason why it cannot withstand appellate analysis and thus deserves scrutiny by this Court, is the fact that workers whose injuries include, for example, emotional or mental disabilities, or who suffer from chronic pain syndrome, are much less likely to receive just awards than their fellow workers whose injuries are recognized by the AMA Guides. As the chancery court noted:

> This lady has a[n AMA Guides] level four, and if I can remember way back a level four carried a percentage of like thirty or forty percent under the old law. And we're sitting here with a lady who is - diagnosed, as I recall, with a level four injury and you can't use any multiplier on it. I certainly think that is discrimination against a person with a psychological injury.

(Memorandum of Opinion at 4; App. D at 60 to 61). Such a blatant discrimination, which serves no legitimate or even discoverable state interest, is an impermissible denial of equal protection under both state, see State v. Sliger, 846 S.W.2d 262, 264 (Tenn. 1993)[5], and federal constitutional standards. Reed v. Reed, 404 U.S. 71, 75-76 (1971). This discrimination is deserving of review by this Court because of the thousands of employees and employers in Tennessee and other states with similar statutory schemes who are affected by the potential application of this statutory scheme.

The supreme court made much of the fact that, in theory at least, the AMA "caps are not absolute and do not apply in every case [but that t]rial courts have the discretion to exceed the caps in cases where the disabled faces the substantial vocational obstacles specifically set out in Tennessee Code Annotated Section 50-7-242" (Opinion at 16; App. B. at 24) (footnote omitted). It emphasizes as well the fact that the non-covered injuries can be compensated outside the operation of the AMA Guides. "When the injury in question is not covered by the Guides," the supreme court argued, "the rating is to be based on any 'appropriate method

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[5] The Opinion notes that "[b]oth the United States and Tennessee Constitutions guarantee to citizens the equal protection of the laws" (Opinion at 10; App. B. at A-17). Tennessee Const., art. I, § 8 (the "law of the land" clause), and art. XI, § 8 (the "general laws" provision) "have consistently [been] held [to] confer the same protection as does the Fourteenth Amendment to the United States Constitution" (Opinion at 11; App. B. at A-18). The discussion of the appropriate "standards of scrutiny" (id. at 11-12; id.), to be applied to this case, therefore, will assume that the Tennessee Supreme Court applied the same standard as would this Court under the Equal Protection Clause.

used and accepted by the medical community'" (Id. at 19-20; id. at 29, quoting T.C.A. § 50-6-241(a)(1),(b)).

The fact that, by way of a vague and open-ended statutory afterthought, the legislature provided for such non-covered injuries to be accorded "an impairment rating by any appropriate method used and accepted by the medical community," T.C.A. § 50-6-241(a)(1), by no means saves the statute. That one class of workers has the advantage of the tightly-organized and precise AMA Guides to define their impairments while the excluded class must search out some sort of cobbled-together ad hoc system to obtain benefits for their injuries, demonstrates the inequity of the impermissible inequality of protection afforded to these two classes of injured workers by the statute.

The fact, in other words, that the Tennessee statute provides an alternative in those cases where the AMA Guides do not apply fails, however, to suggest that T.C.A. § 50-6-241(a)(1) passes that "rational basis" test demanded by cases like Zobel v. Williams, 457 U.S. 55 (1982). The alternative that exists in § 50-6-241(a)(1) for cases not covered by the AMA Guides is simply not up to the task demanded of it; even the supreme court is implicitly forced to admit the difficulties inherent in totaling up part of an impairment under the AMA Guides and the rest of the impairment by other means (Opinion at 17; App. B at 25) ("Plaintiffs' assertions about the Guides are largely accurate. The Guides do not provide percentage ratings for some physical and mental impairments"). The problem with this State's acknowledgement in this regard is not that it is wrong, but that it does not go far enough.

Precisely the same rebuttal applies to the State's suggestion that use of the AMA Guides is not fatal because "the Guides are not the sole determining factor in setting an award of vocational disability" (Opinion at 20; App. B. at 29). When, however, the method for fixing physical disabilities can be easily divined from the AMA Guides but emotional injury and chronic pain must receive compensation, if at all, through application of an informal, ad hoc methodology, the claimant is unlikely indeed to receive just compensation for those injuries not covered by the AMA Guides. Indeed, the chancery court judge himself was frustrated by his inability under the statute to provide anything close to a fair award (Order at 4; App. C at 44). The AMA Guides represent a substantial amount of research by myriad physicians and researchers to quantify physical injuries. To ask a single practitioner to develop equally valid statistics for emotional injuries and chronic pain for a single patient is an unfair and unrealistic request that could not very likely be either accurately or satisfactorily accomplished by even the most expert and well-meaning of physicians. It follows that the inadequacies of the Tennessee statutory scheme is itself a denial of equal protection notwithstanding the legislature's off-hand and hopelessly general attempt to provide a statutory alternative to infirmities not covered by the AMA Guides.

The supreme court generally seeks to justify its mode of analysis by opting for what it calls "the reduced scrutiny test" (Opinion at 13; App. B at 20). Even if the the constitutionality of using AMA Guides in the manner contemplated in the statute is entitled to no more than this analysis, see. e.g., Massachusetts Board of Retirement v.

Murgia, 427 U.S. 307 (1976), one notes that the supreme court seeks to apply an even less stringent test. It seems to assume that a court should apply these rules against a finding of unconstitutionality with particular tenacity in the case of workers' compensation legislation. "This Court," the supreme court observes by way of citing five cases, "has upheld various provisions of Tennessee's workers' compensation scheme against constitutional challenges" (Opinion at 23 n. 9; App. B at 32 n. 9) (citations omitted).

Yet there seems little reason to insulate the statute from the searching inquiry to which legislation generally is justly subjected. In fact numerous courts in other states have recently found workers' compensation law to be unconstitutional on equal protection grounds.[6] There is no apparent reason why Tennessee's Act should prove an exception to this rule. The recent Tennessee enactment is unconstitutional in all the respects urged by Brown in her complaints and found by the chancery judge in his Order and Judgment. Given the importance of this issue to thousands of Tennessee workers at a minimum, this Court is respectfully asked to grant Brown's Petition for a Writ of Certiorari.

2. This case also presents a significant issue regarding whether recent amendments to Tennessee's Workers' Compensation Law, which affect thousands of employers and employees in that state, deny equal

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[6] See, e.g., Romero v. Industrial Claim Appeals Office, 902 P.2d 896 (Colo. Ct. App. 1995); Gilmore v. Alaska Workers' Compensation Board, 822 P.2d 922, 929 (Alaska 1994); Schrimer v. Homestake Mining Co., 118 N.M. 420, 882 P.2d 11, 14 (1994), for a few recent examples.

protection to injured workers by discriminating between educated and uneducated workers. The Tennessee supreme court improperly found that T.C.A. § 50-6-242 was equally capable of passing constitutional muster. What this statutory scheme means in practice is that an uneducated or poorly educated worker suffering a mental disability who suffers serious permanent disability can receive benefits for a maximum of four hundred weeks. On the other hand, a particular worker who has at least an eighth-grade education, transferable skills, and a serious mental disability, would receive no disability benefits at all because he could not satisfy the criteria set out in T.C.A. 50-6-242(1)-(4).

This portion of the legislation discriminates heavily in favor of un- or under-educated workers with serious mental problems and concomitantly denies equal protection to educated workers like Brown with serious mental problems. The chancery court below correctly found the scheme to be facially unconstitutional:

> As the statutory scheme is structured under Act, a mentally injured worker with college training but seriously and mentally impaired could in the end receive no benefits at all as compared with his more fortunate counterparts who suffered mental injuries and were uneducated. The result is that T.C.A. Section 50-6-242 impermissibly discriminates on the basis of eduction against workers who sustain serious disability from mental impairments.

(Order ¶ 11 at 4; App. C at 45). The supreme court defended T.C.A. § 50-6-242 on the ground that the distinction

made between educated and uneducated workers under the Act "is based on a reasonable difference" (Opinion at 21; App. B. at 31). In the eyes of that court, "older or less educated workers . . . may have a higher vocational disability so as to warrant a higher workers' compensation award" (Id.; id.). As a result, the court concludes, "there is a rational basis for the distinction" (Id.; id.).

It is by no means obvious that such a rational basis exists. The State neither offered, nor did the supreme court cite, any evidence whatever to support this theory. Brown also urges that the distinction in the statute between educated and uneducated workers, in the words of local constitutional jurisprudence, "should be subject to strict scrutiny [because] it impermissibly interferes with the exercise of a fundamental right (e.g., voting, intestate travel) or operates to the peculiar disadvantage of a suspect class (e.g. alienage, race)." Harrison v. Schrader, 569 S.W.2d 822, 825 (Tenn. 1978). See Clements v. Fashing, 457 U.S. 957, 963 (1982) ("We have departed from traditional equal protection principles only when the challenged statute places burdens upon 'suspect class" of persons or on a constitutional right that is deemed to be 'fundamental'")(Opinion of Rehnquist, J.).

Brown does not contend that educated workers are necessarily members of a "suspect class." Id. However, it is altogether possible that some level of education is a fundamental right, the pursuit of which would be unduly hindered by the legislation before this Court. Compare San Antonio School District v. Rodriguez, 411 U.S. 1, 35 (1973) ("education, of course, is not among the rights afforded explicit protection under our Federal Constitution. Nor do we

find any basis for saying it is implicitly so protected") with id. at 36 (Court might grant "that some identifiable quantum of education is a constitutionally protected prerequisite to the meaningful exercise of [the] right [to speak and to vote]"). Thus, even if education is not a fundamental right under the U.S. Constitution, it does seem to occupy a place in the pantheon of rights that places it above those entitlements entitled to the relaxed scrutiny of the rational basis test. Cf. Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 441 (1985)(positing "somewhat heightened review" of discriminations made on account of illegitimacy").

In fact, however, education is in Tennessee a fundamental right even if it is not so characterized under the federal constitution. Tenn. Const. art. 11, § 12 (1980 Repl. Vol.), declares that the "[t]he State of Tennessee recognizes the inherent value of education and encourages its support." Similar state constitutional provisions have been held to make education a fundamental right as a result. See Tennessee Small School Systems v. McWherter, 851 S.W.2d 139, 148-50 (Tenn. 1993)(collecting cases). See also Opinion of the Justices, 624 So.2d 107, 157 (Ala. 1993), which collects such cases and declares that "[g]iven the history and text of Alabama's education article, the Court determines that the right to education in Alabama is fundamental[.]"[7]

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[7] Brown recognizes that the interpretation of the Tennessee Constitution is fundamentally a task for Tennessee courts. A state's constitution is binding on its legislature, however. Groves v. Singleton, 20 U.S. (15 Pet.) 449, 502-03 (1841). If education is a fundamental right under the Tennessee constitution, then the legislature's failure to honor that right in enacting workers' compensation legislation is itself a violation of equal protection for which review in this Court is proper.

The supreme court in McWherter noted that it traditionally applies either reduced, heightened, or strict levels of scrutiny in assessing equal protection claims. Tennessee Small School Systems v. McWherter, supra, 851 S.W.2d at 153. The court did not find it necessary to determine into which category education fell because it agreed with the finding that "[i]n the case before the Court, the Chancellor found the public school system to be constitutionally invalid under all three levels of scrutiny." Id. Because the funding system failed even the "'rational basis' test . . . the plaintiffs will be found to prevail and further analysis will not be necessary." Id.

In this case Brown urges that T.C.A. § 50-6-242 similarly flunks all three scrutiny standards, reduced, heightened, and strict. See, e.g., Opinion of the Justices, supra, 624 So.2d at 160 ("Indeed, the Court cannot conclude that the differential treatment at issue here is rationally related to a legitimate state interest under the least searching tier of equal protection analysis, the rationality standard"). But because the statute clearly penalizes workers with higher educational attainments, Brown urges that application of either the heightened or strict scrutiny standard is appropriate, with a finding that equal protection has been violated as a result. The structure of T.C.A. § 50-6-242 is invalid because (a) it impermissibly and unreasonably discriminates against more educated workers with mental disabilities; and (b) offers a reward to workers for not attaining a minimal education level, thereby violating the constitutional duty binding the legislature to effectuate "the inherent value of education and encourage[] its support[.]" Tenn. Const. art. 11, § 12.

Most of the litigation in this area involves the right to an education rather than distinctions made on the basis of educational attainment. The paucity of cases involving discrimination of the sort in issue here is itself an indication of just how constitutionally far-fetched the structure of T.C.A. § 50-6-242 really is. Those few decisions that have analyzed distinctions more or less like those in issue here have doubted that they could withstand constitutional attack.

In Alexander v. Swank, 314 F. Supp. 1082 (N.D. Ill 1970), rev'd on other grounds sub nom. Townsend v. Swank, 404 U.S. 282 (1971), for example, the two courts adjudicating the case examined an Illinois statute and regulation that provided for Aid to Families with Dependant Children ("AFDC") benefits to children between ages 18 to 21 who were attending high school but denied similar benefits to children in college. The three-judge lower court applied the rational basis test and found "a rational connection between these legislative objectives and the classifications[.]" 314 F. Supp. at 1089.[8] This Court reversed the decision below on

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[8] As concurring judge Abraham Lincoln Marovitz noted:

> In my view, however, a serious difficulty arises when the statutory discrimination operates at the post-high school level. The state has asserted that persons enrolled in vocational training programs are intellectually inferior to those in college, but there is no documentation before us to indicate that such is uniformally (sic) or even generally true.

314 F. Supp. at 1090. This is the vice of T.C.A. § 50-6-242. The State has made a judgment that uneducated workers require benefits to which mentally disabled workers need not be given. Yet there is no showing that this supposition is valid or factually supportable, let alone that it

supremacy clause grounds; it therefore did not need to make an equal protection finding. Nonetheless, the Court undertook such an analysis and in the process cast grave doubt on the constitutionality of distinctions based on educational levels:

> [W]e think there is a serious question whether the Illinois classification can withstand the strictures of the Equal Protection Clause. The majority [on the three-judge panel] justified the classification as designed to attain the twin goals of aiding needy children to become employable and self-sufficient, and of insuring fiscal integrity of the State's welfare program. We doubt the rationality of the classification as a means of furthering the goal of aiding needy children to become employable and self-sufficient; we are not told what basis in practical experience supports the proposition that children with a vocational training are more readily employable than children with a college education. And a State's interest in preserving the fiscal integrity of its welfare program by economically allocating limited AFDC resources may not be protected by the device of adopting eligibility requirements restricting the class of children made eligible by federal standards.

404 U.S. at 291. Thus, even applying the rational basis test, the Court doubted the rationality of the classifications.

T.C.A. § 50-6-242 is subject to the same analysis--and result. In addition, when one factors in the possibility that this

particular statute may require the application of heightened scrutiny on account of Tenn. Const. Art 11, § 12, the constitutional infirmity of the statute upon equal protection grounds is established almost beyond any reasonable doubt.

This result is strengthened by the holding in French v. Heyne, 547 F.2d 994, 999 (7th Cir. 1976), which sustained a complaint seeking to strike down on equal protection grounds a practice that denied vocational or educational programs to reformatory inmates who already possessed vocational or high school degrees. The court denied

> that a rational basis for the classification . . . is apparent on the face of the classification itself. In the absence of an articulated purpose for the distinction drawn here, we cannot indulge in supplying an imaginary purpose or basis for the classification[.]

The Tennessee legislature has similarly failed to provide a rational (or heightened) basis for the distinctions in T.C.A. § 50-6-242. Thus, even if this distinction is to be judged by the rational basis test, the discrimination against educated, mentally disabled workers flunks the constitutional test notwithstanding. A grant of Writ here sought is appropriate.

3. **This case presents an important Supremacy Clause issue regarding whether Tennessee Code Annotated § 50-6-241 impermissibly conflicts with the Americans with Disabilities Act of 1990, 42 U.S.C. § 701 et seq. or Section 794 of the Rehabilitation Act of 1973, 29 U.S.C. § 710 et seq.** T.C.A. § 50-6-241(a)(1) should be struck down by this Court not only because it is

unconstitutional but in addition because it is hopelessly in conflict with federal statute law in the form of both the Americans with Disabilities Act ("ADA"), 42 U.S.C. §§ 12101 et seq., and Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794. As such the statute cannot stand because "[u]nder Article VI of the United States Constitution, federal law takes precedence over conflicting state law." T.E.P. v. Leavitt, 840 F. Supp. 110, 111 (D. Utah 1993).

It has been held that "[t]he ADA is intended to insure that qualified individuals receive services in a manner consistent with basic human dignity rather than a manner which shunts them aside, hides, and ignores them." Helen L. v. DiDario, 46 F.3d 325, 335 (3rd Cir. 1995)(footnote omitted). The fact that the statute in issue "discriminates between workers whose medical problems are recognized by the [AMA] Guides and those whose problems are not, such as mental trauma and chronic pain syndrome" (Order at 2; App. C at 45), reveals that T.C.A. § 50-6-241(a)(1) is fatally inconsistent with that goal. Moreover, the statute is also wholly at odds with the specifics of this federal legislation.

In broad terms, the ADA proscribes discrimination on account of a disability. 42 U.S.C. § 12132. The State is subject to these strictures because "[t]he term 'public entity' means--(A) any State or local government[.]" 42 U.S.C. § 12131(1). See Stillwell v. Kansas City, Missouri Board of Police Commissioners, 872 F. Supp. 682, 686-87 (W.D. Mo. 1995)("across-the-board-exclusion on all one-handed applicants" by city police board violates ADA). Workers subject to T.C.A. § 50-6-241(a)(1) are entitled to invoke the

ADA because many of them are by definition "qualified individual[s] with a disability" under 42 U.S.C. § 12131(2).

Nor can there be any doubt that individuals suffering from "mental trauma and chronic pain syndrome" (Order at 2; App. C at 45), that is, those individuals whose medical problems are not recognized by the AMA Guides, are squarely within the coverage of the ADA.[9] The term "disability" as defined in 42 U.S.C. § 12101(2), clearly encompasses such individuals.

Certainly, it is clear as matters of simple definition and logic that individuals entitled to coverage pursuant to the Tennessee workers' compensation statute are encompassed under this definition by dint of the very fact that they are impaired emotionally or mentally to the extent that they are forced to seek an award under the statute. Cf. Clark v. Virginia Board of Bar Examiners, 861 F. Supp. 512, 517 (E.D. Va. 1994), which employed the very term "impairment" in concluding that the test as to whether an individual was covered by the ADA depended upon whether the "impairment" placed significant limitations on his ability to "perform any major life activity." In addition, the ADA is implicated in this Petition because it follows that both physical and mental impairments are disabilities under the

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[9] Because the distinction in T.C.A. § 50-5-241(a)(1) between individuals whose impairments are recognized by the AMA Guides and those whose maladies are not so recognized, does not follow a "bright line rule" (Opinion at 14; App. B. at 22), i.e., a definitional line between those who are covered by the ADA and those who are not, the statute as a whole violates the federal statute.

ADA. Stradley v. Lafourche Communications, Inc., 869 F. Supp. 442, 443 (E.D. La. 1994).

That the violation of the ADA in this case is the enactment of a statute rather than more informal (or discretionary) governmental action is no bar whatever to a finding that T.C.A. § 50-6-241(a)(1) violates the ADA. In T.E.P. v. Leavitt, supra, for example, the governmental violation of the ADA consisted in fact of the legislative enactment of a statute, Utah Code Ann. § 30-1-2(1)(1993 Supp.), legislation "which prohibits and declares void marriage by persons with acquired immune deficiency syndrome (AIDS)[.]" 840 F. Supp. at 111. The statute was held to be "violative of the Americans with Disabilities Act, 42 U.S.C. § 12101 et Seq, (ADA) (1993 Supp.), and the Rehabilitation Act of 1973 of 1973, as amended, 29 U.S.C. § 794 (1993 Supp.)." Id.[10] The same is true here; hence, the statute must be disapproved for its violation of these two enactments. As a result T.C.A. § 50-6-241(a)(1) is illicit on both constitutional and statutory grounds.[11]

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[10] Illegality under the ADA presumes the illegality of § 50-6-241(a)(1) under the Rehabilitation Act of 1973 as well, for "[t]he law developed under section 504 of the Rehabilitation Act is applicable to Title II of the ADA." Helen L. v. DiDario, supra, 46 F.3d at 330 n.7.

[11] Application of the holding in T.E.P. v. Leavitt, supra, would actually make resort to a constitutional analysis unnecessary; "because the offending statute runs afoul of federal statutory law, there is no need to determine whether the statute is unconstitutional under either the Utah State Constitution or the United States Constitution." Id. at 111.

The supreme court's treatment of this issue was both cursory and unconvincing; it merely recycled the argument used to dispatch Brown's equal protection argument to counter her Supremacy Clause allegation (Opinion at 25; App. B. at 36). The supreme court's argument was unconvincing in the equal protection context; it is equally unconvincing here. Accordingly, Brown asks that her Petition for a Writ of Certiorari be granted on this ground as well.

CONCLUSION

Therefore, Petitioner respectfully requests that this Court issue a writ of Certiorari to the Supreme Court of the State of Tennessee.

Respectfully Submitted,

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APPENDIX A

IN THE SUPREME COURT OF TENNESSEE
AT KNOXVILLE

FOR PUBLICATION
FILED December 28, 1995

Plaintiff-Appellee,

ALICE SUE BROWN)
)
v.) Campbell Chancery
)
CAMPBELL COUNTY BOARD OF) Chancellor
EDUCATION, LARRY BRINTON, JR) Billy Joe White
DIRECTOR OF THE DIVISION OF) No. 93S01-9412-
WORKERS' COMPENSATION,) CH-00121
TENNESSEE DEPARTMENT OF)
LABOR, SECOND INJURY FUND,)
STATE OF TENNESSEE, and)
CHARLES BURSON,)
ATTORNEY GENERAL FOR)
THE STATE OF TENNESSEE,)
)
Defendants-Appellants,)
)
and)
)
BRENDA HARLESS,)
)
Plaintiff-Appellee,)
)
v.)

	)	Scott Chancery
	)	
HUNTSVILLE MANOR NURSING	)	Chancellor
	)	Billy Joe White
HOME, STATE OF TENNESSEE	)	
and CHARLES BURSON,	)	No. 03S01-
9501-ATTORNEY GENERAL FOR	)	CH-
00004		
THE STATE OF TENNESSEE,	)	
	)	
Defendants-Appellants.	)	

IN THE SUPREME COURT OF TENNESSEE
AT KNOXVILLE

ALICE SUE BROWN, Plaintiff-Appellee, v. CAMPBELL COUNTY BOARD OF EDUCATION, LARRY BRINTON, JR., DIRECTOR FO THE DIVISION OF WORKERS' COMPENSATION, TENNESSEE DEPARTMENT OF LABOR, SECOND INJURY FUND, STATE OF TENNESSEE, and CHARLES BURSON, ATTORNEY GENERAL FOR THE STATE OF TENNESSEE, Defendants-Appellants, and BRENDA HARLESS, Plaintiff-Appellee, v. HUNTSVILLE MANOR NURSING HOME, STATE OF TENNESSEE	) Appeal No. 03S01-9412-CH-002121) Campbell Chncery No. 13,418 Below) Judgment of Trial Court Reversed in Part, Affirmed in part, and Remanded) Appeal No. 03S01-9501-CH-00004) Scott Chancery No. 7258 Below

and CHARLES BURSON,	) Judgment of) Trial Court
ATTORNEY GENERAL FOR Part, THE STATE OF TENNESSEE, in	) Reversed in) Affirmed) Part, and) Remanded
Defendants-Appellants.	)

JUDGMENT

These cases were heard upon the entire record from the Campbell County and Scott County Chancery Courts, on appeal as of right in this Court, and after considering, the briefs and argument of counsel, this Court is of the opinion that there is reversible error in the judgment of the trial court.

It is, therefore, ordered and adjudged by this Court that the judgment of the trial court is reversed in part, affirmed in part, and the case remanded.

All costs of appeal shall be divided equally between the parties.

12/28/95

APPENDIX B

For Plaintiffs-Appellees Brown and Harless:
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OPINION

JUDGMENT OF TRIAL COURT REVERSED IN PART, AFFIRMED IN PART, AND REMANDED

WHITE, J.

In these consolidated workers' compensation appeals, we must determine whether Tennessee Code Annotated Sections 50-6-241 and 50-6-242, which set out the methods used to determine permanent partial disability benefits, violate the equal protection provisions of the Tennessee or United States Constitutions. Additionally, at issue is whether Tennessee Code Annotated Section 50-6-241 conflicts with the Americans with Disabilities Act of 1990, 42 U.S.C. Section 12101 et seq. or Section 794 of the Rehabilitation Act of 1973, 29 U.S.C. Section 701 et seq. For the reasons explained below, we hold that Tennessee Code Annotated Sections 50-6-241 and -242 do not violate equal protection and that Section 50-6-241 does not violate the cited federal statutes.

FACTS AND BACKGROUND

I. Harless Case

Plaintiff, Brenda Harless, is a high-school graduate who has held jobs as a nurse's aid, waitress, maid, druggist's assistant, and factory worker. At the time of trial, she was thirty-four years old. On January 16, 1993, Harless injured her back lifting a patient in the course and scope of her employment as a nurse's aid for defendant employer, Huntsville Manor Nursing Home. Harless was treated by Dr. Robert Finelli, a neurosurgeon, who recommended physical therapy and a work hardening program after detecting a bulging disk. On June 14, 1993, Dr. Finelli released Harless to return to work as a nurse's aid with a lifting restriction of twenty-five pounds for four weeks, followed by a return to full and regular duty. He assessed an anatomical impairment

of 2 to 3% to the whole body. After Harless was released by Dr. Finelli, Huntsville Manor Nursing offered to put her back to work at the same rate of pay she was making when she was injured. Harless did not respond to this offer because she was not feeling well enough to return to work. She did, however, attempt to work as a cashier at a convenience store, a less physically demanding job, than the one she had at the nursing home, but was not able to complete a full shift due to back pain.

In April, 1994, Harless was referred by her lawyer to Dr. William Kennedy, an orthopedic surgeon. Dr. Kennedy saw Harless on one occasion and diagnosed a herniated disk. In Dr. Kennedy's view, a herniated disk is synonymous with a bulging one, the condition diagnosed by Dr. Finelli. Dr. Kennedy opined that Harless had not been physically able to work since her back injury on January 16, 1993. He recommended that she not return to "any type of work that would require lifting greater than twenty-five pounds at a time or six pounds constantly, and that she should not do any work that would require vigorous pushing or pulling." Dr. Kennedy assigned a 14% whole body anatomical impairment rating.

In addition to Doctors Finelli and Kennedy, Harless consulted with Dr. Larry Wolfe, a family practitioner. Dr. Wolfe began treating Harless on January 31, 1994, for psychiatric problems, specifically depression and anxiety. Dr. Wolfe found her "extremely disabled" on account of emotional difficulties stemming from the back injury and her resulting inability to work and support her family. Dr. Wolfe was unable to provide a numerical percentage of mental

impairment or a percentage of anatomical impairment reflecting Harless's pain under the American Medical Association's Guides to the Evaluation of Permanent Impairment (4th ed. 1993)("AMA Guides") because the AMA Guides provide no such percentage.

Two vocational experts testified as well. Dr. Norman Hankins testified that Harless was 100% vocationally disabled due to her back injury and mental condition. Dr. Craig Colvin gave Harless a 20 to 25% vocational disability rating.

II. Brown Case[1]

Alice Brown, the plaintiff in the consolidated case on appeal, was fifty years old at the time of trial. She has a high-school education and has completed some college study. For approximately ten years, Brown worked in food service for the defendant employer, Campbell County Board of Education. On October 6, 1992, while trying to open a steam table in the kitchen at the elementary school where she worked, Brown suffered injuries to her neck and shoulders. Later that month Brown was injured again when she fell on her buttocks while taking inventory in the stock room at the school.

Brown's family physician, Dr. Lee Durham, a family practitioner, opined that Brown's work-related injuries aggravated her pre-existing emotional problems of severe and

---

[1]No trial transport or statement of evidence has been filed by the parties. The facts, as recited herein, are based upon the pleadings and stipulated medical records and testimony found in the record.

chronic depression. Dr. Durham could not provide a percentage of permanent mental disability under the AMA Guides because the Guides provide no such numerical percentage. Brown could, however, be classified as having "marked impairment" under the AMA Guides due to her psychological problems.[2]

Realizing that Brown's back and neck conditions needed specialty care, Dr. Durham referred her to a neurosurgeon, Dr. Eugenio Vargas. Dr. Vargas first saw Brown in December, 1992. After extensive testing, Dr. Vargas found "disk abnormalities," but felt that Brown's back and neck problems were "muscular-ligamentous" in nature and did not require surgery. Dr. Vargas found no objective indication that Brown had suffered a permanent injury as a result of the October 1992 work incidents. Consequently, he assessed no anatomical impairment, and referred Brown back to Dr. Durham for physical therapy.

Dr. William Kennedy, the same orthopedic surgeon that evaluated Harless, also evaluated Brown. Dr. Kennedy assessed an anatomical impairment rating of 21% to the whole body as a result of Brown's back and neck conditions.[3] According to Dr. Hankins, her vocational disability following the October injuries is at least 95%.

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[2]The AMA Guides define "marked impairment" as "a level of impairment that significantly impedes useful functioning." AMA Guides at Section 14.7.

[3]Plaintiff refers to a 95% vocational impairment rating given by Dr. Norman Hankins in her brief. No affidavit, report, or deposition of Dr. Hankins appears in the record.

III. Trial Court's Findings

In the Harless case, the chancellor found that Harless was 86% permanently disabled. He attributed 56% of the permanent disability to the back injury and 30% to the resulting emotional condition. In the Brown case, the chancellor found 90% permanent partial disability to the whole body, with 60%(56% physical and 4% emotional) attributable to the first injury in October, 1992, and 30%(28% physical and 2% emotional) to the second injury. In both cases, the chancellor found that Tennessee Code Annotated Section 50-6-241(a)(1) and (c) was unconstitutional. Specifically, the court found Section 241(a)(1) to be

> "arbitrary, capricious, illegal, and unconstitutional because it violates the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution and unfairly discriminates between workers whose medical problems are recognized by the [AMA Guides] and those whose problems are not, such as mental trauma and chronic pain syndrome.

The court went on to declare the provision as violative of equal protection

> in that it provides workers who return to the same employment with less disability than those workers who do not return to the same employment.

As to Section 24(c), the court based its finding of unconstitutionality on the unreasonable classification of workers with AMA recognized injuries and those whose injuries are not AMA recognized. Therefore, the court concluded that "this statute unfairly discriminates between workers whose medical problems are recognized by the [AMA Guides] and those whose problems are not."

Finally, the court declared Section 241(c) to be unconstitutional

> because the statute requires that the multipliers established by T.C.A. Section 50-6-241(a) and T.C.A. Section 50-6-241(b) be maximum limits. The Court further finds that the ratings in the [AMA Guides] have nothing whatever to do with the inability to work. In the real world of an actual work injury, a worker with a slight impairment might be (given the nature of his occupation) completely unable to continue

> in his trade, while another worker might suffer a more serious injury and yet (because of the nature of his or her occupation) be able to continue working. Incorporation of the [AMA Guides] into the statutory scheme of the Tennessee Workers' Compensation Act in spite of these truths is therefore arbitrary, capricious, and irrational.

In the Brown case, the chancellor also held Section 232 unconstitutional because it discriminates between educated and uneducated workers.

ANALYSIS

I. The Statutes in Question

Reduced to its essentials, Tennessee Code Annotated Section 50-6-241[4] establishes maximum permanent disability

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[4] The statute provides in part:

> (a)(1) For injuries arising on or after August 1, 1992, in cases where an injured employee is eligible to receive any permanent partial disability benefits...and the pre-injury employer returns the employee to employment at a wage equal to or greater than the wage the employee was receiving at the time of injury, the maximum permanent partial disability award that the

employee may receive is two and one-half (2 1/2) times the medical impairment rating determined pursuant to the provisions of the American Medical Association Guides to the Evaluation of Permanent Impairment (American Medical Association), the Manual for Orthopedic Surgeons in Evaluating Permanent Physical Impairment (American Academy of Orthopedic Surgeons), or in cases not covered by either of these, an impairment rating by any appropriate method used and accepted by the medical community. In making determinations, the court shall consider all pertinent factors, including lay and expert testimony, employee's age, education, skills and training, local job opportunities, and capacity to work at types of employment available in claimant's disabled condition.

* * *

(b) Subject to factors provided in subsection (a) of this section, in cases for injuries on or after August 1, 1992, where an injured employee is eligible to receive permanent partial disability benefits...and the pre-injury employer does not return the employee to employment at a wage equal to or greater than the wage the employee was receiving at the time of injury, the maximum permanent partial disability award that the employee may receive is six (6) times the medical impairment rating determined pursuant to the provisions of the American Medical Association Guides to the Evaluation of Permanent Impairment (American Medical Association), the Manual of Orthopedic Surgeons in Evaluating Permanent Physical Impairment (American Academy of Orthopedic Surgeons), or in cases not covered by either of these, an impairment rating by any appropriate method used and accepted by the medical community. In making such determinations the court shall consider all pertinent factors, including lay and expert testimony, employee's age, education,

awards for employees based on medical impairment rating and multipliers selected by the legislature. The medical impairment rating must be determined in accordance with specific guides and manuals, or if not covered by those, by any "appropriate method used and accepted by the medical community." The maximum permanent partial disability award an employee may receive depends on whether the employee is returned to work after injury at an equal or greater wage than at the time of injury. In setting an award, the court must consider all relevant factors, including lay and expert testimony, the employee's age, education, skills, training, local job opportunities, and the employee's capacity to work at the types of employment available to the employee

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skills and training, local job opportunities, and capacity to work at types of employment available in claimant's disabled condition.

(c) The multipliers established by subsections (a) and (b) are intended to be maximum limits. If the court awards a multiplier of five (5) or greater, then the court shall make specific findings of fact detailing the reasons for awarding the maximum impairment. In making such determinations, the court shall consider all pertinent factors, including lay and expert testimony, employee's age, education, skills and training, local job opportunities, and capacity to work at types of employment available in claimant's disabled condition.

Tenn. Code Ann. Section 50-6-241(a)(1),(b) and (c)(1995 Supp.).

in the employee's disabled condition. Tenn. Code Ann. Section 50-6-241(a)(1),(b)&(c)(1995 Supp.).

Notwithstanding these maximums found in Section 241, Section 242[5], the other statute found to be

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[5]The statute provides:

> Notwithstanding any provision of this chapter to the contrary, the trial judge may award employees permanent partial disability benefits, not to exceed four hundred (400) weeks, in appropriate cases where permanent medical impairment is found and the employee is eligible to receive the maximum disability award under Section 50-6-241(a)(2) or (b). In such cases the court, on the date of maximum medical improvement,must make a specific documented finding, supported by clear and convincing evidence, of at least three (3) of the following four (4) items:
>
> (1) The employee lacks a high school diploma or general equivalency diploma or the employee cannot read or write on a grade right (8) level;
>
> (2) The employee is age fifty-five (55) or older;
>
> (3) The employee has no reasonably transferable job skills from prior vocational background and training; and,
>
> (4) The employee has not reasonable employment opportunities available locally considering the

unconstitutional by the chancellor, authorizes an award in these caps in situations in which the employee is eligible for a maximum award and establishes three of four conditions pertaining to age, education, job skills, and local job opportunities. Tenn. Code Ann. Section 50-6-242 (1995 Supp.).

II. Applicable Constitutional Standards

Both the United States and Tennessee Constitutions guarantee to citizens the equal protection of the laws. The Fourteenth Amendment to the United States Constitution provides that "[n]o state shall...deny to any person within its jurisdiction the equal protection of the laws." In two separate provisions, applicable in different circumstances, our state Constitution provides an equal protection guarantee. State v. Tester, 879 S.W.2d 823, 827 (Tenn. 1994); Tennessee Small School Sys. v. McWherter, 851 S.W.2d 139, 152 (Tenn. 1993). The first provision found in Article I, Section 8, known as the "law of the land" clause, provides that individuals shall not be deprived of

> liberties or privileges, or outlawed, or exiled, or in any manner destroyed or deprived of...life, liberty or property but by the judgment of...peers or the law of the land.

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employee's permanent medical condition.

Tenn. Const. Art. I, Section 8. The second relevant Tennessee constitutional provision, Article XI, Section 8, reads in part:

> General laws only to be passed. -- The Legislature shall have no power to suspend any general law for the benefit of any particular individual, nor to pass any law for the benefit of individuals inconsistent with the general laws of the land; nor to pass any law granting to any individual or individuals, rights, privileges, immunitie, [immunities] or exemptions other than such as may be, by the same law extended to any member of the community, who may be able to bring himself within the provisions of such law.

We have consistently held that these two provisions confer the same protections as does the Fourteenth Amendment to the United States Constitution. State v. Tester, 879 S.W.2d at 827; Tennessee Small School Sys. v. McWherter, 851 S.W.2d at 152. Thus, in analyzing equal protection challenges, we have followed the analytical framework developed by the United States Supreme Court,

which, depending on the nature of the right asserted, applies one of three standards of scrutiny: (1) strict scrutiny, (2) heightened scrutiny, and (3) reduced scrutiny, applying the rational basis test. State v. Tester, 879 S.W.2d at 828; Tennessee Small School Sys. v. McWherter, 851 S.W.2d at 153.

The parties have disagreed on the applicable level of scrutiny. Defendants urge the court to apply a reduced scrutiny standard, examining the statutes under rational basis test. Plaintiffs argue that strict scrutiny should apply, at least as to Section 242 which distinguishes between educated and uneducated workers. Thus, plaintiffs contend that the statute unduly hinders the pursuit of education because its provisions result in educated workers receiving smaller awards.

Strict scrutiny applies to those classifications "saddled with such disabilities, or subjected to such a history of purposeful unequal treatment or relegated to such a position of political powerlessness as to command extraordinary protection...and thus be denominated a suspect class" so as to invoke a strict scrutiny analysis. Newton v. Cox, 878 S.W.2d 105, 109 (Tenn. 1994)(quoting San Antonio Independent School District v. Rodriguez, 411 U.S. 1,28 (1973)). Educated persons to not meet the definition of a suspect class. Further, the statute is simply a reflection of the common law which recognizes the level of education as a legitimate factor in determining vocational disability. Robinson v. Loretto Casket Co., 722 S.W.2d 380, 384 (Tenn. 1986)("The assessment of...disability is based upon numerous factors, including the employee's...education...."). It does not abridge a fundamental right nor does it distinguish between persons

on a suspect basis. Newton v. Cox, 878 S.W.2d at 109. Consequently, we hold that the appropriate standard for assessing the constitutionality of the statutes in question is the reduced scrutiny standard employing the rational basis test.[6]

Compared to heightened and strict scrutiny, the reduced scrutiny test imposes upon those challenging the constitutionality of a statute the greatest burden of proof. Tennessee Small School Sys. v. McWherter, 851 S.W.2d at 153. The test has been described as follows:

> The concept of equal protection espoused by the federal and our state constitutions guarantees that 'all persons similarly circumstanced shall be treated alike.' Conversely, things which are different in fact or opinion are not required by either constitution to be treated the same. The initial discretion to determine what is 'different' and what is 'the same' resides in the legislatures of the States, and legislatures are given considerable latitude in

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[6]Previous equal protection challenges to the workers' compensation act have been analyzed by this Court using the rational basis test. See e.g., Kelley v. 3-M Co., 639 S.W.2d 437 (Tenn. 1982).

> the same. In most instances the judicial inquiry into the legislative choice is limited to whether the classifications have a reasonable relationship to a legitimate state interest.

State v. Tester, 879 S.W.2d at 828 (emphasis in original)(quoting Tennessee Small School Sys. v. McWherter, 851 S.W.2d at 153). Thus, if a reasonable basis exists for the difference in treatment under the statute, or if any set of facts can reasonably be conceived to justify it, the statue is constitutional. Id.; see also Newton v. Cox, 878 S.W.2d at 110. Equal protection does not require absolute equality. Nor does it mandate that everyone receive the same advantages. Tennessee Small School Sys. v. McWherter, 851 S.W.2d at 153 ("If[the different treatment] has a rational basis, it is not unconstitutional merely because it results in some inequality.")(quoting Harrison v. Schrader, 569 S.W.2d 822, 825 (Tenn. 1978); see also Genesco, Inc., v. Woods, 578 S.W.2d 639, 641 (Tenn. 1979). Unless the individual challenging the statutes can establish that the difference are unreasonable, the statute must be upheld. Tennessee Small School Sys. v. McWherter, 851 S.W.2d 154 (quoting Harrison v. Schrader, 569 S.W.2d at 826).

While no bright line rule for determining reasonableness exists, there are some helpful parameters. The classification must be naturally and reasonably related to that which it seeks to accomplish. Some reason to distinguish and prefer the particular individual or class must exist.

> There must be reasonable and substantial differences in the situation and circumstances of the persons placed in different classes which disclose the propriety and necessity of the classification. If legislation arbitrarily confers upon one class benefits, from which others in a like situation are excluded, it is a grant of a special right, privilege, or immunity, prohibited by the Constitution, and a denial of the equal protection of the laws to those not included.... The fundamental rule is that all classifications must be based upon substantial distinctions which make one class really different from another; and the characteristics which form the basis of the classification must be germane to the purpose of the law....

State v. Tester, 879 S.W.2d at 829 (emphasis in original).

III. Application of Standards to Cases

The trial court's findings that Sections 241 and 242 violate equal protection are based on conclusions that three classifications were discriminatory. First, the court found a discriminatory classification based on the workers whose medical problems are recognized by the AMA Guides and those whose are not. Second, the court held that the statute discriminates between workers who are able to return to work and those who cannot. Third, the court found that Section 242 unconstitutionally discriminates between workers based on education level. Plaintiffs and amicus, the Tennessee Trial Lawyers Association, allege the same equal protection violations. We, thus, turn to the crucial question of whether the classifications bear a reasonable relationship to any legislature state interest; that is, whether the challenged statutes satisfy the rational basis test.

A. The Caps/Multipliers

Rather than challenging the rationality of the caps, or maximum multipliers, on permanent partial disability, plaintiffs challenge the method used to arrive at the impairment rating which, under the statute, is used in conjunction with the multipliers to determine the maximum award. Nonetheless, we begin our inquiry with that threshold question: Are the caps, or multipliers, contained in Section 241 rationally based?

A valid criticism of our workers' compensation system

prior to the 1992 reforms which included the challenged statutes was that awards for similar impairments varied widely across the state. The multipliers substantially reduce the possibility of similarly situated workers with like injuries and anatomical disability ratings receiving vastly different awards. Reasonably uniformity in statutory awards is a legitimate state interest.

Additionally, the caps provide employees, employers and their insurers with a measure of predictability since all awards have defined outer limits. Predictability in the law is obviously a desirable and legitimate legislative objective, one that serves the interests of the parties, bench, and bar. In addition to providing a degree of uniformity and predictability, the caps serve the state's interest in keeping workers' compensation insurance premiums from escalating to the point that industry cannot affirm them, a well-known factor driving the reforms of 1992. Newton v. Cox, 878 S.W.2d at 110 ("It is conceivable that the General Assembly concluded that the contingency cap [on attorney's fees in medical malpractice cases] would further the purposes the Medical Malpractice Act by reducing malpractice insurance costs...."). Finally, it is important to note that the caps are not absolute and do not apply in every case. Tenn. Code Ann. Section 50-6-242 (1995 Supp.). Trial courts have the discretion to exceed the caps in cases where the disabled employee faces the substantial vocational obstacles specifically set out in Tennessee Code Annotated Section 50-6-242.[7]

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[7]As an aside, we note that the workers' compensation scheme is replete with caps established by the legislature. The caps established for permanent partial disability in Tennessee Code Annotated Section 50-6-241 is analogous in principle to the maximum benefits provided for in

B. Use of the AMA Guides

Plaintiffs argue that the use of the AMA Guides as contemplated by Tennessee Code Annotated Section 50-6-241 violates the equal protection because (1) numerical percentage ratings are not provided for certain medical conditions, such as mental impairment or chronic pain, (2) factors other than a physician's interpretation of anatomical impairment are not considered in determining vocational disability and, (3) the AMA Guides themselves caution against their exclusive use in fashioning awards of vocational disability.

Plaintiffs' assertion about the Guides are largely accurate. The Guides do not provide percentage ratings for some physical and mental impairments. See e.g., AMA Guides at Sections 14.7 (behavioral and mental disorders) &

Tennessee Code Annotated Section 50-6-207(3) for injuries to scheduled members; the 400 week cap on permanent partial disability benefits contained in Tennessee Code Annotated Section 50-6-242; the 260 week limit on permanent total disability injuries which occur after age sixty in Tennessee Code Annotated Section 50-6-207(4); the cap of 400 weeks on temporary partial disability in Tennessee Code Annotated Section 50-6-207(2); the limits on death benefits as provided for in Tennessee Code Annotated Section 50-6-210; and the 20% cap on attorney's fees in Tennessee Code Annotated Section 50-6-226(a).

15.8 (pain conditions).[8] Additionally, the Guides caution against their exclusive use in determining vocational disability.

> The critical problem is that no formula is known by which knowledge about a medical condition can be combined with knowledge about other factors to calculate the percentage by which the employee's industrial use of the body is impaired. Accordingly, each commissioner or hearing official must come to a conclusion on the basis of assessment of the available medical and nonmedical information. The Guides may help resolve such a situation, but it cannot provide complete and definitive answers. Each administrative or legal system that uses permanent impairment

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[8]The Guides rate mental impairment on a five level scale that ranges from no impairment to extreme impairment (none, mild, moderate, marked, and extreme). AMA Guides at Section 14.7. Each level is specifically defined. Id. As to pain, impairment percentages for organ systems include pain that may accompany the impairing condition. Id. at Section 2.2; otherwise, pain can be classified under the Guides as minimal, slight, moderate, or marked. Id. at Section 15.8. Each of these levels is also specifically defined by the Guides. Id.

> as a basis for disability ratings should define its own mans for translating knowledge about an impairment into an estimate of the degree to which the impairment limits the individual's capacity to meet personal, social, occupational, and other demands....
>
> It must be emphasized and clearly understood that impairment percentages derived according to [the] Guides criteria should not be used to make direct financial awards or direct estimates of [vocational] disabilities.

AMA Guides at Section 1.5.

Our recognition that the system is imperfect does not mean that it is unconstitutional. The reasonable and legitimate state interests applicable to the multipliers - uniformity, fairness and predictability - are equally applicable to the use of the Guides. See Tenn. Code Ann. Section 50-6-204(d)(3)(1995 Supp.)("To provide uniformity and fairness for all parties, any medical report prepared by a physician furnishing medical treatment to a claimant shall use [The AMA Guides].")(emphasis added). The Guides themselves acknowledge that their use "increases objectivity and enables

physicians to evaluate and report medical impairment in a standardized manner, so that reports from different observers are more likely to be comparable in content and completeness." AMA Guides at Section 1.7. Thus, the legislation is reasonably related to and accomplishes significant state interests.

If the Guides were not used, medical opinions would be more subjective, and perhaps, arbitrary. Tt is no surprise, therefore, that most states either mandate, recommend, or frequently use the Guides in workers' compensation cases. Id. at Section 1.4. Tennessee is no exception. Even before Tennessee Code Annotated Section 50-6-241 was enacted, this Court upheld the use of the Guides as proper evidence of disability. Harness v. CNA Ins. Co., 814 S.W.2d 733 (Tenn. 1991).

Plaintiffs argue that workers' whose injuries are not covered by the Guides receive no benefits. This is simply not true. The Guides provide anatomical impairment ratings expressed in a percentage. The workers' compensation statutes award benefits not for medical impairment but for vocational disabilities. Jefferson County Schools v. Headrick, 734 P.2d 659 (Colo. Ct. App. 1986)(employee was entitled to vocational disability benefits for hearing loss even though the AMA Guides provided no percentage of anatomical impairment for such an injury); Dayton Corp. v. Morehead, 509 So.2d 930 (Fla.1987)("T]he AMA Guides are inapplicable when...they preclude a finding of permanent impairment where the claimant suffered a disability...which permanently impairs his ability to work...."). Our legislature

has recognized that the Guides do not cover all types of injuries. When the injury in question is not covered by the Guides, the rating is to be based on "any appropriate method used and accepted by the medical community." Tenn. Code Ann. Section 50-6-241(a)(1)&(b)(1995 Supp.). Thus, a medical expert can still provide an impairment rating based upon the expert's training and experience consistent with methods used and accepted by the medical profession. Accord Dayton Corp. v Morehead, 509 S.W.2d at 931 ("When an injury is not covered by the AMA Guides, it is permissible to rely upon medical testimony of permanent impairment based upon other generally accepted medical standards."). Because the legislature has provided a reasonable rating alternative for medical conditions not included in the Guides, plaintiffs' argument that those whose conditions not covered by the Guides are discriminated against is without merit.

Contrary to plaintiffs' assertions, the Guides are not the sole determining factor in setting an award of vocational disability. Tennessee Code Annotated Section 50-6-241 explicitly requires courts to "consider all pertinent factors, including lay and expert testimony, employee's age, education, skills and training, local job opportunities, and capacity to work at types of employment available in claimant's disabled condition." Tenn. Code Ann. Section 50-6-241(a)(1),(b)&(c)(1995 Supp.). These factors must be considered regardless of whether the employee's medical condition is rated by the Guides. While physical impairment is a factor that has some bearing on the ultimate issue of

vocational disability, Corcoran v. Foster Auto GMC, Inc., 746 S.W.2d 452, 459 (Tenn. 1988), this Court has distinguished between anatomical impairment and vocational disability. Perkins v. Enterprise Truck Lines, Inc., 896 S.W.2d 123, 125 (Tenn. 1995).

The statutory scheme is consistent with our recognition that the extent of vocational disability is a separate, distinct issue from the extent of physical impairment. Worthington v. Modine Mfg. Co., 798 S.W.2d 232, 234 (Tenn. 1990); Davenport v. Taylor Feed Mill, 784 S.W.2d 923, 925 (Tenn. 1990); Corcoran v. Foster Auto GMC, Inc., 746 S.W.2d at 457. The statute fulfills legitimate state interests and does not discriminate against those whose disabilities must be rated by a method other than the Guides.

C. Return to Work/Education Level Distinction

Again, plaintiffs are correct in their assertions that the statute distinguishes between workers who are able to return to work and those who cannot and between workers with various levels of education. Making a distinction does not necessarily result in an equal protection violation. Defendants argue that the educational level distinction is reasonable because the less educated worker is likely to encounter greater difficulty re-entering the job market after an injury. We agree. The factors in Tennessee Code Annotated Section 50-6-242 merely recognize that older or less educated workers with no transferable job skills or no reasonable employment opportunities may have a higher vocational disability so as to warrant a higher workers' compensation award. The different treatment of workers who satisfy this criteria is based upon a reasonable difference. Thus, there is a rational basis for the distinction.

Similarly, it is reasonable to treat the worker who returns to work making as much or more than before the injury differently than the worker whose injuries prevent the return to work at the before-injury wage. The fact that a worker's income has declined is relevant to the determination of vocational disability. The statute allows the Court to consider the factor by allowing an increase in an award for such an employee. Indeed, even before Section 241 was enacted, the fact or re-employment after an injury was relevant in determining the extent of vocational disability. Corcoran v. Foster Auto GMC, Inc., 746 S.W.2d at 459.

The statute is consistent with the common law. It

encourages employers to retain injured workers at wages equal to or greater than wages received prior to the injury by providing for smaller disability awards if the employee is retained. Re-employment of injured workers is a legitimate state objective which justifies the distinction between those injured employees who are returned to work and those who are not. The distinction has a rational basis.

In sum, we hold that plaintiffs have failed to carry their burden of showing that Tennessee Code Annotated Sections 50-6-241 and 242 are not reasonably related to any legitimate state interests. See Fritts v. Wallace, 723 S.W.2d 948, 950 (Tenn. 1987)(Party attacking the constitutionality of statute must demonstrate its unconstitutionality); see also Shelby Cty. Election Com'n v. Turner, 755 S.W.2d 774, 777 (Tenn. 1988)(if any reasonable construction satisfies constitutional requirements, courts have an obligation to uphold the statute); Marion Cty. Bd. v Marion Cty. Election Com'n, 594 S.W.2d 681, 684 (Tenn. 1980)(any doubt as to the constitutionality of a statute should be resolved in favor of finding it constitutional); Dennis v. Sears, Roebuck & Co., 446 S.W.2d 260, 263 (Tenn. 1969)(a strong presumption in favor of constitutionality exists when a statute is challenged).[9] The impairment rating model of Tennessee Code Annotated Sections 50-6-241 and 242, including the multipliers, use of the AMA Guides and the other factors in the statute, and the

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[9]This Court has upheld various provisions of Tennessee's workers' compensation scheme against constitutional challenges. See e.g., Kelley v. 3-M Co., 639 S.W.2d 437 (Tenn. 1982); Nichols v. Benco Plastics, Inc., 469 S.W.2d 135 (Tenn. 1971); Mitchell v. Usilton, 242 S.W.2d 648 (Tenn. 1922); Vantrease v. Smith, 227 S.W. 1023 (Tenn. 1921); Scott v. Nashville Bridge Co., 223 S.W. 844 (Tenn. 1920).

escape provisions in section 242, assist courts in determining the extent of vocational disability, provide a measure of uniformity and fairness, foster predictability, encourage employers to return injured employees to work, and may aid in controlling the rising costs associated with work-related injuries. The statutes are rationally based. They do not violate equal protection. Therefore, the trial court erred in finding the statutes unconstitutional.

IV. Challenges Under the Americans With Disabilities Act of 1990 and the Rehabilitation Act of 1973

Although not raised below, plaintiffs assert on appeal that Tennessee Code Annotated Section 50-6-241 conflicts with the Americans With Disabilities Act of 1990 ("ADA"), 42 U.S.C. Section 12101 et seq., and Section 794 of the Rehabilitation Act of 1973, 29 U.S.C. Section 701 et seq. The argument is based solely upon the claimed illegal discrimination between workers whose medical problems are recognized by the AMA Guides and those whose problems are not.

> The pertinent provision of the ADA states:
>
> [N]o qualified individual with a disability shall, by reason of such disability, be excluded from participating in or be denied the benefits of the

> services, programs or activities of a public entity, or be subjected to discrimination by any such entity.

42 U.S.C. Section 12132 (1995 Supp.). The relevant section of the Rehabilitation Act of 1973, Section 794 (formerly Section 504), provides in part:

> No otherwise qualified individual with a disability in the United States...shall, solely by reason of her or his disability, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance or any program or activity conducted by any executive agency or by the United States Postal Services.

29 U.S.C. Section 794 (1995 Supp.).

In order to establish a claim under the Rehabilitation Act of 1973, plaintiff must demonstrate that he or she (1) has a disability recognized under the act; (2) is qualified for participation in the program; (3) is being excluded from

participation in, being denied the benefits of, or being subjected to discrimination under the program solely by reason of the disability; and (4) that the relevant program or activity is receiving federal financial assistance. Thomas By and Through Thomas v. Davidson Academy, 846 F.Supp. 611, 617 (M.D.Tenn. 1994). To establish a claim under the ADA, a plaintiff must prove a similar set of elements. Id.

Tennessee's workers' compensation system is obviously not operated by a federal executive agency. Moreover, there is no proof in the record that our workers' compensation system operates using federal money. Thus, under its own terms, the Rehabilitation Act of 1973 is not applicable.

Regardless of applicability, the real flaw in plaintiffs' position is that Tennessee Code Annotated Section 50-6-241 provides permanent partial disability benefits to all injured workers with vocational disability, so long as there is work-related permanent impairment. It does not exclude any injured worker from receiving benefits based solely upon his or her disability. The fact that the AMA Guides do not provide percentages of impairment for every type of injury does not prevent a worker from recovering benefits. Section 241 explicitly provides alternate methods for determining impairment ratings for those injuries not recognized by the Guides. Thus, if the work-related medical problem resulting in permanent impairment is not covered by the Guides, the statue still provides a way for injured workers to establish entitlement to benefits. We find no basis for plaintiff's claim that Section 241 conflicts with so as to violate the federal statutes.

V. Harless's Extent of Disability and Alleged Misrepresentation

Having decided that neither Section 241 or 242 violate equal protection, the ADA, or the Rehabilitation Act of 1973, we address the arguments of the employer in the Harless case concerning her extent of disability and purported misrepresentations on her employment application.[10] Huntsville Manor Nursing argues that Harless is barred from recovering for mental impairment because she misrepresented her mental condition on her employment application. To establish such a misrepresentation defense, the employer must establish that: (1) the employee knowingly and willfully made a false representation of her physical condition; (2) the employer relied upon that misrepresentation in making the decision to hire the employee; and (3) the misrepresentation was material in that there was a causal relationship between the false representation and the work-related injury sustained by the employee. Berry v. Consolidated Systems, Inc., 804 S.W.2d 445, 446 (Tenn. 1991); Shelton v. Clevepak Container Corp., 752 S.W.2d 508, 509 (Tenn. 1988).

As a part of her employment application, Harless completed a health examination form. She responded "no" to a question that asked ["h]ave you ever been treated for or ever had any known indication of...mental or nervous disorder." Her family physician, Dr. Wolfe, testified that

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[10]Brown's employer, the Campbell County Board of Education, apparently does not contest the trial court's award of benefits. Brown's award will not be disturbed on appeal, particularly in light of the fact that no transcript or statement of evidence has been filed.

Harless had "nerve problems" preceding her employment with Huntsville Manor and had been taking anti-depression medication for these "nerve problems." Harless conceded as much at trial. Further, a psychological consultant's report dated September 13, 1993, concluded that "[s]he has been on the waiting list to receive psychotherapy at Ridgeview Psychiatric Center in Oneida, Tennessee, for the past few years." This report also states that "[t]he claimant reports that she began having problems with her nerves two years ago." Harless certainly knew that she had "been treated for or ever had any known indication of...a mental or nervous disorder."

The director of nursing at Huntsville Manor who hired Harless testified that he relied upon the truthfulness of the information contained in her questionnaire in hiring her, especially since the work she was being hired to do was "a very stressful job." Thus, the first two elements of the misrepresentation defense have been satisfied.

As to the third element of causation, defendant relies upon a statement by Dr. Wolfe that an individual with a nervous disorder would be more prone to injury or to a worsening of the nervous condition than someone without a nervous disorder. Dr. Wolfe did not testify that Harless' emotional problems were worsened by her work-related injuries. He only testified as to the indirect connection between emotional illness and injury proneness is too remote to establish causation between Harless' misrepresentation and her injury. Thus, defendant may not avail itself to the misrepresentation defense.

Defendant Huntsville Manor also claims that the two

and one-half cap on benefits contained in Section 241 should apply because defendant offered to return Harless to a position consistent with her lifting restrictions at her pre-injury wage. See Ten. Code Ann. Section 50-6-241(a)(1)(1995 Supp.)(if "the pre-injury employer returns the employee to employment at a wage equal to or greater than the wage the employee was receiving at the time of injury, the maximum permanent partial disability award that the employee may receive is two and one-half (2 1/2) times the medical impairment rating...."). Defendant, therefore, urges the Court to find that Harless was constructively returned to work because she did not attempt to preform her duties. The problem with this argument is that it ignores whether Harless could return to work at the nursing home.[11]Her attempt to work at a much less physically demanding job after the injury was unsuccessful. Two physicians verified her inability to return to work. Based on this evidence, we conclude that Harless was not able to return to work on account of the severity of her physical and emotional injuries. Therefore, her refusal to return to the nursing home was reasonable, and the two and one-half cap is applicable. Had Harless unreasonably refused to return to work, the two and one-half cap would have applied.[12]Consequently, the trial court did

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[11]Taking the employer's argument to its logical conclusion, the two and one-half cap on benefits could always be triggered merely by the employer making an offer to return the employee to work, regardless of the employee's ability to work or the sincerity or genuineness of the offer.

[12]See Wheatley v. Camden Casting Center, Inc., No. 02S01-9503-CV-00025 (Special Workers' Compensation Appeals Panel decision adopted and affirmed by this Court on August 28, 1995)("[A]n injured employee may not increase the maximum allowable award by unreasonably refusing an employer's offer to return the employee to work at a job for which the employee is qualified and which the employee is able to perform within

not err in applying a multiplier of four to the anatomical impairment rating provided by Dr. Kennedy.

Finally, Huntsville Manor argues that the trial court erred in awarding 30% permanent partial disability for Harless's emotional injury because Dr. Wolfe did not provide a percentage of mental impairment. Instead, Dr. Wolfe opined that Harless was "extremely impaired mentally," and pointed out that the AMA Guides do not provide a numerical percentage rating for mental injuries. Dr. Wolfe was not asked to provide a percentage of impairment based on his training and experience, separate and apart from the AMA Guides, or one based on his training and experience taking into account the levels of mental impairment provided in the Guides, all of which are specifically defined. Section 241 permits an impairment rating to be given "by any appropriate method used and accepted by the medical community" in circumstances in which the Guides do not apply. Neither party requested that Dr. Wolfe give an impairment rating other than one based on the AMA Guides. Consequently, the record does not contain a rating of Harless's mental impairment. However, because it is rather obvious from the record that Harless has sustained substantial mental impairment, we remand her case to the trial court for further proof on this point, after which the trial court shall fashion an

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her restrictions."); see also, Bailey v. Krueger Ringier, Inc., No. 02S01-9409-CH-00061 (Special Workers' Compensation Appeals Panel decision adopted and affirmed by this Court on May 17, 1995)(A "meaningful" return to work is a sound construction of Tenn. Code Ann. Section 50-6-241(a)(1).).

appropriate award consistent with this opinion.

For the foregoing reasons, the judgment of the trial court is reversed in part, affirmed in part, and the case remanded. Costs shall be split evenly between the parties.

PENNY J. WHITE, JUSTICE

CONCUR:

Anderson, C.J.
Drowota, Reid, Birch, J.J.

APPENDIX C

IN THE CHANCERY COURT FOR CAMPBELL COUNTY, TENNESSEE AT JACKSBORO

ALICE SUE BROWN	)	
	)	
Plaintiff,	)	CIVIL ACTION
	)	NO: 13,418
vs.	)	
	)	
CAMPBELL COUNTY BOARD OF EDUCATION, LARRY BRINTON, JR., DIRECTOR OF THE DIVISION OF WORKERS' COMPENSATION, TENNESSEE DEPARTMENT OF LABOR, SECOND INJURY FUND, STATE OF TENNESSEE, and CHARLES BURSON, ATTORNEY GENERAL FOR THE STATE OF TENNESSEE,	)	
	)	
Defendants.	)	

ORDER AND JUDGMENT

This matter came to be heard on the 12th day

of September, 1994, before the Honorable Billy Joe White, Chancellor of the Chancery Court for Campbell County, Tennessee, and again on September 15, 1994, upon the pleadings, testimony in open court, and the record as a whole, and on Motion of the Plaintiff to specifically plead that T.C.A. Section 50-6-242 was also arbitrary, capricious, illegal, and unconstitutional, the Court did allow the Plaintiff to amend her Complaint to specifically plead that T.C.A. Section 50-6-242 was also arbitrary, capricious, illegal, and unconstitutional, because it violates the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution and unfairly discriminates between workers whose medical problems are recognized by the AMA Guides and those whose problems are not, such as mental trauma and chronic pain syndrome, and T.C.A. Section 50-6-242 discriminates against workers who have more than an eighth grade education and are seriously mentally disabled.

This matter came further to be heard on September 12, 1994, at which time the Plaintiff, by and through her attorney announced to the Court that she was taking a voluntary dismissal of any claims based on age discrimination for the enactment of the Tennessee Workers' Compensation Reform Act and that the Plaintiff was also taking a voluntary dismissal of any claims regarding the caps on attorney fees and it is hereby **ORDERED** that the Plaintiff's claims concerning age discrimination and the caps on attorney fees under the Tennessee Workers' Compensation Reform Act of 1992 are dismissed.

This matter came further to be heard on the 12th day of September, 1994, and the 15th day of September,

1994, upon the pleadings, testimony in open court, and the record as a whole, at which time the Court issued an Opinion, a copy of which has been or will be filed and incorporated by reference herein. Additionally, after considering the entire record, the Court finds:

1. That during the latter part of October 1992, while employed in the course and scope of her employment as a cook, the Plaintiff was in a stock room at the Jellico Elementary School taking inventory when she suddenly slipped and fell and injured her back and sustained compensable work injuries, including emotional injuries.

2. The Court further finds that the Plaintiff is entitled to weekly benefits under the Tennessee Workers' Compensation Act of One Hundred Forty-One Dollars and Fifty-One Cents ($141.51) per week.

3. The Court further finds that the Defendant, Campbell County Board of Education, received timely notice of the Plaintiff's injuries.

4. The Court further finds that the Plaintiff's injuries were causally related to the industrial accident which the Plaintiff sustained in the latter part of October 1992.

5. That the proof in this cause, including the medical evidence, the testimony of the Plaintiff, and the entire record, and considering all the Plaintiff's previous disability, establishes that the Plaintiff has sustained a combined disability of ninety percent (90%) permanent disability to the body as a whole, and that the Plaintiff, as a

result of the injury which occurred in the latter part of October, 1992, that the Plaintiff is entitled to receive a disability award in the amount of thirty percent (30%) to the body as a whole, twenty-eight percent (28%) of which is attributed to the Plaintiff's physical back injury and two percent (2%) of which is attributed to the Plaintiff's emotional injuries.

6. The Court further finds that Section 1.5 of the American Medical Association's Guides to the Evaluation of Permanent Impairment, Fourth Edition, at page 1/5 states that "Impairment percentages derived according to *Guides* criteria should not be used to make direct financial awards or direct estimates of disabilities."

7. The Court further finds that the Tennessee Workers' Compensation Reform Act of 1992 uses impairment percentages to make direct financial awards or direct estimates of disability of injured workers.

8. The Court finds that the Plaintiff suffered physical as well as emotional injuries and that there is no adequate provision in the Workers' Compensation Statutes to compensate the Plaintiff.

9. The Court finds that the Plaintiff's condition, "chronic low back syndrome" or "chronic pain syndrome" is a condition not adequately addressed by the A.M.A. Guides.

10. The Court finds that there is not an appropriate method used and accepted by the medical community for granting the Plaintiff an appropriate

impairment rating outside of the use of the A.M.A. Guides.

11. The Court declares T.C.A. Section 50-6-241(a)(1), T.C.A. Section 50-6-241(b), T.C.A. Section 50-6-241(c), and T.C.A. Section 50-6-242 to be arbitrary, capricious, illegal, and unconstitutional because they violate the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution and unfairly discriminate between workers whose medical problems are recognized by the Guides and those whose problems are not, such as mental trauma and chronic pain syndrome. Additionally, the Court further finds that T.C.A. Section 50-6-242 is discriminatory on its face because it clearly and unequivocally discriminates in favor of uneducated workers as compared with educated workers. Uneducated workers under a mental disability who suffer serious permanent disability are entitled to benefits to the maximum of four hundred (400) weeks. If the worker has an eighth grade education, transferable skills, and is seriously mentally disabled, he or she receives no disability because they cannot satisfy the criteria as otherwise enumerated in T.C.A. Section 50-6-242. Such a scheme obviously discriminates heavily in favor of uneducated workers with mental problems and denies equal protection to educated workers with serious mental problems. As the statutory scheme is structured under the Act, a mentally injured worker with college training but seriously and mentally impaired could in the end receive no benefits at all as compared with his more fortunate counterparts who suffered mental injuries and were uneducated. The result is that T.C.A. Section 50-6-242 impermissibly discriminates on the basis of education against workers who sustain serious disability from mental impairments.

12. The Court further finds that after reviewing the AMA Guides' section dealing with mental and behavioral disorders, the Guides do not allow the evaluator to give a numerical rating for mental impairments. A person who appears to concentrate adequately on a mental status examination or in a psychological test situation may not do so in a more "real life" work program. Deficiencies in concentration as a result of mental disorders can be just as disabling, if not more disabling than, a ruptured disc. Yet under T.C.A. Section 50-6-242, a high school educated or college educated worker could be deprived of disability under the Act while an uneducated worker would be awarded disability.

13. The Court further finds and declares T.C.A. Section 50-6-241(a)(1) to be illegal and unconstitutional because the statute also violates equal protection of the Fourteenth Amendment of the United States Constitution in that it provides workers who return to the same employment with less disability than those workers who do not return to the same employment.

14. The Court further finds and declares T.C.A. Section 50-6-241(b) and T.C.A. Section 50-6-241(c) to be arbitrary, irrational, illegal, and unconstitutional because these statutes unreasonably classify injured workers whose injuries are recognized by the A.M.A. Guides and those who injuries are not so recognized as in this case. The Court finds that it is arbitrary, capricious, illegal, and unconstitutional for the multipliers to be intended to be maximum limits. The Court therefore declares T.C.A. Section 50-6-241(b) and T.C.A. Section 50-6-241(c) to be in violation of the Equal

Protection Clause of the Fourteenth Amendment of the United States Constitution because these statutes unfairly discriminate between workers whose medical problems are recognized by the Guides and those whose problems are not.

15. The Court further finds and declares T.C.A. Section 50-6-241(c) to be arbitrary, capricious, irrational, and unconstitutional and in violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution because the statute requires that the multipliers established by T.C.A. Section 50-6-241(a) and T.C.A. Section 50-6-241(b) are maximum limits. The Court further finds that the ratings in the Guides have nothing whatever to do with the inability to work. In the real world of an actual work injury, a worker with a slight impairment might be (given the nature of his occupation) completely unable to continue in his trade, while another worker might suffer a more serious injury and yet (because of the nature of his or her occupation) be able to continue working. Incorporation of the A.M.A. Guides into the statutory scheme of the Tennessee Workers' Compensation Act in spite of these truths is therefore arbitrary, capricious, and irrational.

16. The Court further finds and declares T.C.A. Section 50-6-241(a)(1), T.C.A. Section 50-6-241(b), and T.C.A. Section 50-6-241(c) to be arbitrary, irrational, illegal, and unconstitutional because these statutes unreasonably classify injured workers whose injuries are recognized by the A.M.A. Guides again and those whose injuries are not so recognized.

17. The Court further finds that at least seventy-one (71) weeks of disability benefits have accrued since the date that the Plaintiff reached maximum medical improvement in May 1993, until the date of the Court's Opinion of September 15, 1994, for which the Plaintiff is entitled to receive the sum of Ten Thousand Forty-Seven
Dollars and Twenty-One Cents ($10,047.21) in a lump sum from the Defendant, Campbell County Board of Education.

18. The Court further finds that the Plaintiff has established a need for future medical treatment related to her injuries.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED as follows:

1. That the Defendant, Campbell County Board of Education, shall furnish such medical expenses for the accident occurring in the latter part of October 1992, including medical treatment solely and proximately caused by said injuries, as required and defined by Section 50-6-204 of the Tennessee Code Annotated.

2. That the Plaintiff's injuries are compensable under the Tennessee Workers' Compensation Act and the Plaintiff shall receive a judgment from the Defendant, Campbell County Board of Education, in the sum of Sixteen Thousand Nine Hundred Eighty-One Dollars and Twenty Cents ($16,981.20) which sum represents disability benefits in the amount of thirty percent (30%) permanent partial disability to the body as a whole to which the Plaintiff is

entitled. It appearing to the Court that at least seventy-one (71) weeks of benefits have accrued, it is further **ORDERED** that the sum of Ten Thousand Forty-Seven Dollars and Twenty-One Cents ($10,047.21) shall be paid to the Plaintiff in a lump sum. That thereafter the Plaintiff's benefits shall be paid to the Plaintiff in the amount of One Hundred Forty-One Dollars and Fifty-One Cents ($141.51) per week until the Plaintiff's benefits are exhausted.

3. That on Motion of the Plaintiff's attorney, David H. Dunaway, it is also **ORDERED** that the Plaintiff's attorney is awarded attorney fees and a lien not to exceed twenty percent (20%) of the entire judgment in the amount of Three Thousand Three Hundred Ninety-Six Dollars and Twenty-Four Cents ($3,396.24) all of which shall be paid to the Plaintiff's attorney, David H. Dunaway, in one lump sum.

4. The Court declares T.C.A. Sections 50-6-241(a)(1), T.C.A. Section 50-6-241(b), T.C.A. Section 50-6-241(c), and T.C.A. Section 50-6-242 to be arbitrary, capricious, illegal, and unconstitutional because they violate the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution and otherwise unfairly discriminate between workers whose medical problems are recognized by the Guides and those whose problems are not, such as mental trauma and chronic pain syndrome and because these statutes also create class distinctions between workers in violation of the Equal Protection Clause of the Fourteenth Amendment.

5. The Court declares T.C.A. Section 50-6-241(a)(1) to be illegal and unconstitutional because this

statute also violates equal protection in that it provides workers who return to the same employment with less disability than workers who do not return to the same employment.

6. The Court declares T.C.A. Section 50-6-241(b) to be arbitrary, capricious, irrational, unconstitutional, and illegal because this statute violates the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution, and it unfairly discriminates between workers whose medical problems are recognized by the Guides and those whose problems are not, such as mental trauma and chronic pain syndrome.

7. The Court further finds that the primary purpose of workers' compensation benefits is to replace some portion of wage loss, actual or potential, with cash managed benefits which should be closely tied to the disabled individual's loss of income. T.C.A. Sections 50-6-241(a)(1) and 50-6-241(b) take the physician's impairment rating, by using the A.M.A. Guides and translates them directly into a benefit without adequately considering the workers' age, occupation, education, training, experience, earning capacity, ability to perform the job, employability, or any other relevant disability factors.

8. Because of the enactment of workers' compensation laws, workers have given up their common law right to sue their employers for negligence in exchange for a system that is supposed to compensate them at least partially for loss of earning capacity as a result of an industrial injury. T.C.A. Sections 50-6-241(a)(1), 50-6-241(b) and 50-6-241(c)

do not adequately do this. They compensate not on the basis of disability, loss of income, or loss of earning capacity, but on the basis of impairment with the multipliers required to be maximum limits, which may or may not be related to the workers' lost earning capacity or ability to obtain and retain employment. Such a system is both arbitrary and capricious and these statutes are therefore declared unconstitutional as a result.

9. The Court declares T.C.A. Section 50-6-241(c) to be arbitrary, capricious, irrational, and unconstitutional. The statute requires that the multipliers established by T.C.A. Section 50-6-241(a) and T.C.A. Section 50-6-241(b) to be maximum limits. Ratings in the Guides have nothing whatever to do with the inability to work. In the real world of an actual work injury, a worker with a slight impairment might be (given the nature of his occupation) completely unable to continue in his trade, while another worker might suffer a much more serious injury and yet (because of the nature of his or her occupation) be able to continue working. Incorporation of the Guides into the statutory scheme in spite of these truths is therefore arbitrary, capricious, and irrational.

10. The Court declares T.C.A. Section 50-6-241(a)(1) and T.C.A. Section 50-6-241(b) and T.C.A. Section 50-6-241(c) to be arbitrary, irrational, illegal, and unconstitutional because these statutes unreasonably classify injured workers whose injuries are recognized by the Guides, and those whose injuries are not so recognized. This classification is not rationally related to the Act's purpose of increasing benefits to workers.

11. The Court finds that the Fourteenth Amendment of the United States Constitution in Section One provides, "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." The class distinctions made by granting a worker who does not return to the same job more disability than a worker who does return to the same job is a denial of equal protection.

12. The Court declares T.C.A. Section 50-6-242 to be discriminatory on its face because it clearly and unequivocally discriminates in favor of uneducated workers as compared with educated workers. Uneducated workers under a mental disability who suffer serious permanent disability are entitled to benefits to the maximum of four hundred (400) weeks. If, on the other hand, the worker has an eighth grade education or transferable skills and is seriously mentally disabled, he or she may be denied disability because they cannot satisfy the criteria as otherwise enumerated in T.C.A. Section 50-6-242. Such a scheme obviously discriminates heavily in favor of uneducated workers with mental problems and denies equal protection to educated workers with serious mental problems. As the statutory scheme is structured under the Act, a mentally injured worker with college training but seriously and mentally impaired could in the end receive little or no benefits at all as compared with his more fortunate

counterparts who suffered mental injuries if they were uneducated. The result is that the statute, T.C.A. Section 50-6-242, impermissibly discriminates on the basis of education against workers who become seriously disabled from mental impairments.

13. It is further **ORDERED** that the Defendant, Larry Brinton, Jr., Director of the Division of Workers' Compensation, Tennessee Department of Labor, Second Injury Fund, be and the same is hereby dismissed from this cause.

14. It is further **ORDERED** that the costs of this cause shall be taxed to the Defendant, Campbell County Board of Education, for which execution may issue if necessary.

ENTER this 24th day of October, 1994.

_____

CHANCELLOR

APPROVED FOR ENTRY:

DAVID H. DUNAWAY & ASSOCIATES

BY:_____

DAVID H. DUNAWAY
ATTORNEY FOR PLAINTIFF

BY:_____
IMOGENE KING
ATTORNEY FOR DEFENDANT
CAMPBELL COUNTY BOARD OF EDUCATION

_____
ANNE T. WIDSETH
ATTORNEY FOR DEFENDANT
LARRY BRINTON, JR., DIRECTOR OF THE
DIVISION OF WORKERS' COMPENSATION,
TENNESSEE DEPARTMENT OF LABOR,
SECOND INJURY FUND

_____
DIANNE STAMEY DYCUS
ATTORNEY FOR DEFENDANTS
STATE OF TENNESSEE AND CHARLES
BURSON, ATTORNEY GENERAL FOR
THE STATE OF TENNESSEE

CERTIFICATE OF SERVICE

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and exact copy of the foregoing has been served on all interested counsel by placing the same in the United States mail with sufficient postage thereon to insure delivery.

Dated this 19th day of September, 1994.

David H. Dunaway
100 S. Fifth Street
P. O. Box 231
LaFollette, TN 37766
(615) 562-7085

APPENDIX D

IN THE CHANCERY COURT FOR CAMPBELL COUNTY, TENNESSEE

ALICE SUE BROWN,

Plaintiff,

vs. No. 13,417
13, 418

CAMPBELL COUNTY BOARD
OF EDUCATION, ET AL.

Defendant.

APPEARANCES:

MR. DAVID H. DUNAWAY,
Attorney for the Plaintiff

MS. IMOGENE A. KING
Attorney for the Defendant

MS. ANNE T. WIDSETH

MEMORANDUM OF OPINION

SEPTEMBER 15, 1994

Thompson & Childress
Post Office Box 411
Aloca, Tennessee 37701
(615) 579-6881

This cause came on for hearing on the 15th day of September, 1994, in the Chancery Court for Campbell County, Tennessee, the Honorable Billy Joe White presiding.

The following opinion was given by the Court:

> THE COURT: The Court agrees with the defense to some extent on this case. To look at this overall case, I understand that this is two cases. To look at all of the evidence overall this lady is not totally in every manner disabled. She has a better mind and a better education than most people we see. She is limited to sedentary work. Now, a person fifty years old with some college education and with three or four ruptured discs in her back probably can find some work. I don't have great hope for her, but under the law she's probably not totally disabled. She could probably be a motel clerk or do some very limited sedentary type work such as that. So overall looking at this case the Court can see the defense of

this matter, and has to rather agree that this lady has got a lot of get up and go about her. She probably can find some type of sedentary work. But I think she has a very serious injury, much more serious than the defense credits her with.

She has, as I understand the medical, three substantiated ruptured or serious disc problems and perhaps a fourth. In 1986, she had a low back disc rupture at L-4 and Dr. Hankins says that during this period of time even with her working she's ninety percent. Well, I wouldn't want to particularly go along with that. But there's no question but to what she had substantial disability and was working when she fell down and injured her neck or picked up an item. She already had sustained considerable disability at that time, but continued to work even after that before she saw a doctor. But based on that injury I'm going to use a multiplier of four times Kennedy's fourteen, but fifty-

six plus four for part of her psychological injury. On the last fall —

MR. DUNAWAY: That's sixty percent total on the first injury?

THE COURT: That's sixty on the first injury. Then on the next case where she fell down and ruptured the L-3 low back disc, the Court is going to use four times the seven multiplier and that is twenty-eight and add two more for psychological injury, giving her an overall of ninety percent for the two cases.

Of course, the Court is already handling another case that this statute is unconstitutional for this psychological reason, and other reasons that the legislature does not give any way of using the multiplier.

This lady has a level four, and if I can remember way back a level four carried a percentage of like thirty or forty percent under the old law. And we're sitting here with a

lady who is diagnosed, as I recall, with a level four injury and you don't use any multiplier on it. I certainly think that is discrimination against a person with a psychological injury.

Of course, on that I have already filed in another case and made certain findings in that case about it, and I'm going to adopt the conclusions that are contained in the proposals here concerning the constitutionalities because it's the same basically that we had in the other case. I'm going to grant the one week temporary total, future medical, and on the discretionary cause.

MR. DUNAWAY:
Let me ask you just for clarification, you've given sixty percent on the October 6th, 1992 injury?

THE COURT:
Correct.

MR. DUNAWAY:
You said as a result of that injury and the new one she has a ninety percent, but if you were to treat this as a "B" case you would add the ninety to the sixty, and she's now permanently and totally disabled. You would have one hundred and fifty percent and anything above one hundred would be paid by the second injury fund. Now, if I understand his Honor's findings you're saying that she is ninety percent disabled as a result of all of the injuries as a result of the last one. She's sixty percent on the October 6th --

THE COURT: And thirty on the next one.

MR. DUNAWAY: So if I if I have to draw these findings and this order of judgment as I understand then on the second issue, you're finding on the second case, you're finding her ninety percent disabled on the second case.

THE COURT: Not ninety additional, thirty additional. Sixty on the first one and thirty on the second.

MR. DUNAWAY: Okay. Well, your Honor to have a clean "B" case which is what this is because you've decided case one, the employer takes that employee as they find them with that pre-existing disability, we're going to October, you made a finding of sixty percent on the first one. When you get to case two, you're now saying that she's not permanently and totally disabled, she's ninety percent disabled. Subsection B requires that you stack those. This employer then becomes responsible for adding those together. This employer would then pay ten percent on the second one and fifty percent -- excuse me, strike that, forty percent because you're taking the employee as you find them. And if she's ninety percent disabled now as a result of both injuries, you've made it an award already for the sixty percent. A clear Subsection

"B" case, that's what this is now, it's not an "A" case, it's a "B" case, you have a sixty percent disability and while this other injury is only thirty percent more she's entitled under the law to that full ninety percent. You stack them and the second injury fund – I didn't write this statute, the legislature did. As a Subsection "B" pure case she's entitled to that, and that's got to be clear.

THE COURT: You've confused a lot people.

MR. DUNAWAY: It's a "B" case, your Honor.

MS. KING: Mr. Dunaway, I think, is assuming that you have to result – let me say that I would love to have the second injury fund share in part of my bill, but I've already made myself clear on that. Mr. Dunaway is assuming that because he sued the second injury fund that he has to reach them.

THE COURT: He what?

MS. KING: He seems to be arguing that because he has sued the second injury fund that he has to reach them. That is not a necessary conclusion. I don't think that his argument is necessary to the conclusion at all.

MR. DUNAWAY: Your Honor, look at the statute. 50-6-208 Subsection B, you've already decided the first one. After you've done that you add the disabilities together and if they equal or exceed, and in this case they equal now one hundred and fifty percent. And you've already made your award for the sixty percent on the first one, and you say that she has an additional thirty percent now for the last one and I agree with that. The Court has made a finding, you now have a confirmation of one hundred and fifty percent -- I see Mr. Pryor shaking his head here -- but that is exactly what the Court is required to do. And because the statute was made in such a away that you combined the awards you don't take them now. That's why I

had to difference cases. The only reason -- I could have taken this case and tried the neck case first, but as a matter of judicial economy we tried them together, and we tried together because when we separated them we've got the neck case, you gave sixty percent with the combination of that previous back problem. Now, you say that she's got an additional thirty, you add those together and it exceeds one hundred percent. That's the law; I didn't write it. And that is what the Court is required to follow. It's not an "A" case anymore.

MS. KING: If Mr. Dunaway can add sixty percent to thirty percent and get one hundred and fifty, he's got more fingers and toes than I do. Let's assume that the October 6th, 1992 injury was tried a year ago, was tried immediately after that happened.

MR. DUNAWAY: And the Court gave sixty percent.

MS. KING: Sixty percent

award. And she continued to work as she did in that case, she fell and injured her lower back, and the Court felt that she had thirty percent disability. As a result, she would have two workers' compensation awards totalling ninety percent. If she goes back to work as we hope that she will, and as we hope that she won't have another accident that would then be added in the future and then any excess over one hundred percent. You have a sixty percent award and a thirty percent award that's a total of ninety percent. That's the total for workers' compensation awards, and I don't see how you can get more than that.

MR. DUNAWAY: Here's how you do it.
Because, Your Honor, the Supreme Court has told us and this is the case they use against her. You cannot reopen that other award. They're asking this Court to assume that on that last injury that she was only thirty percent disabled. You can't do that because she's got a previous award now of

sixty percent. She's now ninety percent disabled as a combination of all. Subsection "B" says you add them together. I didn't write it.

MS. WIDSETH: Your Honor, in Subsection "A" where he says you add impairments to find out if they are permanently and totally disabled through Subsection "B" you add awards. You don't stack up an award and then another award to it, you add awards.

MR. DUNAWAY: Your Honor, you found that she's sixty percent as a result of October 6th, and you found that she was ninety percent as a result of the more recent. That's giving her an award of ninety percent of for the second one because they had to take and forward all disabilities and they can't reopen that and now say, "Well, she's only thirty percent disabled, " when they agreed where the Court found in the previous injury she was sixty percent. I think in the previous injury she was sixty percent. I think that is a fair

and equitable distribution.

THE COURT: I'm like all defense counsel in this case, I don't know enough about it, I guess, to either agree or disagree with you on that. What I've done very carefully is found in the first case involving the neck, and considering the pre-existing disability, on sixty percent and adding into that some psychological. And on the next injury I found a result of that lumbar back problem thirty percent. Now, how the law adds that I don't know, but I meant to give her ninety percent.

MR. DUNAWAY: Okay. Now, ninety percent then with everything for the last injury, including the last injury.

THE COURT: Sixty on the first and thirty on the second.

MR. DUNAWAY: All right. Now, Your Honor, if you'll listen to me just a moment.

THE COURT: I understand

what you're saying. You're saying that you take the first sixty and add it to the thirty and go to ninety and add the sixty back for one hundred and fifty. I understand what you're saying. I don't understand that to be the law. I though that under either one of the circumstances that before you hang injury you have to have a total disability, on hundred percent.

MR. DUNAWAY: No, you don't, Your Honor, you can have two awards. If the total of the awards exceed one hundred percent, she doesn't have to be permanent and totally disabled. You've already covered that issue, if it exceeds – have a gentleman, I'll give you his name, Leroy Braden, three hundred and ninety-five percent disabled. We had an award of permanent and total disability; the employer paid nothing. You stack all of the previous awards. It's the only one that I've ever had in this court that was that much; the employer paid nothing. Then she finds

another job and gets hurt again or whatever and goes back, which we hope she can, then you look at it again, if you're saying that she's sixty percent disabled on the first one you can't ignore that disability when you go into the second. You're saying now that as a result of that she has an additional thirty percent, that's ninety percent total. You're basically saying there's very little she can do as a result of everything now, that last injury, she's ninety percent disabled.

THE COURT: That's what I said.

MR. DUNAWAY: Okay. If the Court says that then she's entitled to a ninety percent award for the last one.

THE COURT: We don't agree with him, do we?

MS. KING: No, Your Honor.

MS. WIDSETH: No.

THE COURT: I hope you can go on appeal and get that

clarified and win it.

MR. DUNAWAY: I need to have a finding of fact in Court because if someone asks, " Mr. Dunaway, why would the Court, as a result of the last injury, why was the Court establishing the vocational disability?" With the last injury, I think you told me it was ninety percent?

THE COURT: From that last injury thirty percent.

MR. DUNAWAY: Thirty percent additional?

THE COURT: Additional to the sixty.

MR. DUNAWAY: All right. Which means that at the time she left there, she's ninety percent disabled.

THE COURT: There's no question about that.

MR. DUNAWAY: No question about it. I'll put that in the record and we'll have somebody look through it.

MS. KING: May I ask that if Dr. Durham refers her that it be to an authorized specialist.

MS. KING: May I ask that if Dr. Durham refers her that it be to an authorized specialist?

THE COURT: Yes, it would have to be.

MR. DUNAWAY: If he wants to send her to a specialist you can give us a panel of three psychiatrists.

THE COURT: Any specialist as per panel.

MR. DUNAWAY: Otherwise, we're happy at this time with Dr. Durham if the Court has no objection to this. Your Honor, it finally comes down to the discretionary cause.

MS. KING: I object to one of those.

THE COURT: I like to go backwards on discretionary cause. Which of them do you object to?

MS. KING: I've only got one objection, and it's a five dollar bill.

THE COURT: Sustained.

MR. DUNAWAY: Now, I assume that the Court has no objections that she would get accrued benefits from May of '93 to the present time, and I will draw the Order to reflect that. It's a matter of law that she gets that.

MS. KING: She has accrued from the date of trial, seventy-five weeks, which totals ten thousand six hundred thirteen dollars and twenty-five cents.

THE COURT: And lump sum attorney fees.

MR. DUNAWAY: Now, one other thing, Your Honor, in your findings of fact, you say that you will dump those. I would ask and we submit to you on page two the proposed findings that you include in subparagraph one, "The Court declares T.C.A. Section 50-6-241-A, subparagraph one, and

also add 50-6-242 to the arbitrary capricious because that's the mental impact that you discussed, and that would be the only other thing that I would add to that.

THE COURT: All right. Put those in.

MR. DUNAWAY: Thank you, Your Honor.

(Thereupon, the proceedings were adjourned.)

_____

Judge

Approved by:

_____

Attorney for Plaintiff

_____

Attorney for Defendant

_____

Attorney for the Second Injury Fund

CERTIFICATE

I, Lisa Jones Wilson, Notary Public in and for the State of Tennessee at Large, do hereby certify that the foregoing 15 pages is a true and accurate transcript of the opinion transcript of the opinion taken by me on the 15th day of September, 1994.

This is the _____day of _____, 1994.

_____
Notary Public
My Commission Expires 12-10-97

APPENDIX E

IN THE CHANCERY COURT FOR CAMPBELL COUNTY, TENNESSEE AT JACKSBORO

ALICE SUE BROWN,	)
	)
Plaintiff,	) CIVIL ACTION
	) NO: 13,418
vs.	)
	)
CAMPBELL COUNTY BOARD OF EDUCATION, LARRY BRINTON, JR., DIRECTOR OF THE DIVISION OF WORKERS' COMPENSATION, TENNESSEE DEPARTMENT OF LABOR, SECOND INJURY FUND, STATE OF TENNESSEE, and CHARLES BURSON, ATTORNEY GENERAL FOR THE STATE OF TENNESSEE,	)
	)
Defendants.	)

AMENDED COMPLAINT

Comes the Plaintiff, pursuant to Rule 15 of the Tennessee Rules of Civil Procedure, and would amend her Complaint and show unto the Court the following:

(1) The Plaintiff is and at all times mentioned herein was a citizen and resident of Campbell County, Tennessee.

(2) That the Defendant, Campbell County Board of Education, is and at all times mentioned herein was the Plaintiff's employer. The Defendant, Campbell County Board of Education, is a governmental entity with offices at Jacksboro, Tennessee, and process has been previously served on its managing agent, Mr. Arlis Chapman, pursuant to Rule 4 of the Tennessee Rules of Civil Procedure. The Defendant, Larry Brinton, Jr., is the Director of the Division of Workers' Compensation for the Tennessee Department of Labor, Administrator of the Second Injury Fund, and who has been previously served through the office of the Attorney General for the State of Tennessee, 450 James Robertson Parkway, Nashville, Tennessee. The Defendant, State of Tennessee, is being made a party to this cause of action with regard to the validity and/or constitutionality of certain portions of the Workers' Compensation Reform Act for 1992, and the State of Tennessee is being made a party pursuant to Rule 4 of the Tennessee Rules of Civil Procedure. Additionally, the Defendant, Charles Burson, is being made a party to this cause of action due to the fact that Charles Burson is the Attorney General for the State of Tennessee and the validity and/or constitutionality of various statutes of the workers' compensation laws for the State of Tennessee as provided in Section 50-6-101, et seq of the Tennessee Code Annotated are being drawn into question. The Defendant, State of Tennessee, may be served through the Attorney General for the State of Tennessee, 450 James Robertson Parkway, Nashville, Tennessee. The Defendant, Charles Burson, Attorney General for the State of Tennessee, may

be served at 450 James Robertson Parkway, Nashville, Tennessee, pursuant to Rule 4 of the Tennessee Rules of Civil Procedure.

(3) That this is a proceeding under and by virtue of the Workers' Compensation Laws for the State of Tennessee for benefits as provided in Section 50-6-101 et seq of the Tennessee Code Annotated.

(4) The Defendant, Larry Brinton, Jr., Director of the Division of Workers' Compensation, Tennessee Department of Labor, is being made a party to this cause of action pursuant to claims which the Plaintiff has from the State of Tennessee "Second Injury Fund".

(5) That during the latter part of October 1992, while employed in the course and scope of her employment as a cook, the Plaintiff was in a stock room at the Jellico Elementary School taking inventory when she suddenly slipped and fell, sustaining serious and disabling injuries to her back, right hip, right leg, and various other parts of her body. This industrial accident occurred in Campbell County, Tennessee.

(6) That as a result of the aforesaid industrial accident which arose out of and in the course and scope of the Plaintiff's employment, the Plaintiff was rendered disabled to work and earn wages. The Plaintiff has also incurred certain medical expenses.

(7) The Plaintiff would further show to the Court that prior to the latter part of October, 1992, the Plaintiff had previously sustained permanent disability of which her employer, Campbell County Board of Education, was

aware, and as a result of the Plaintiff's previous disability and the above described injuries, the Plaintiff believes that she has sustained additional disability and has become or will become permanently and totally disabled from any gainful occupation.

(8) That granting the Plaintiff workers' compensation benefits in a lump sum would be in the Plaintiff's best interest and the Plaintiff has the ability to wisely manage and control a lump sum award. Alternatively, the Plaintiff would request that her attorney fees be paid in a lump sum.

(9) Additionally, the Plaintiff brings this action as a challenge to the constitutionality and legality of the "Workers' Compensation Reform Act of 1992" which emphasizes non-adversarial, informal dispute resolution as an alternative to litigation, attempts to control increasing medical costs by authorizing the creation of a system of case management and review of utilization and quality of medical services, places a cap on the permanent partial disability rating which an employee may receive unless certain circumstances are present, provides for permanent total disability benefits to age 65, raises the maximum weekly benefits to 100 percent of the state average weekly wage over a six year period, and authorizes the creation of a state workers' compensation insurance fund.

(10) The Plaintiff urges that certain portions of the "Workers' Compensation Reform Act of 1992" be declared invalid and/or unconstitutional.

(11) The "Workers' Compensation Reform Act of 1992," more particularly at T.C.A. Section 50-6-

241(a)(1), provides for injuries arising on or after August 1, 1992, and in cases where an injured employee is eligible to receive permanent partial disability benefits for unscheduled injuries, and where an employee returns to employment at a wage equal to or greater than the wage the employee was receiving at the time of the injury, the maximum permanent partial disability award that the employee may receive is two and one-half times the medical impairment rating, determined pursuant to the provisions of the *American Medical Association Guides to the Evaluation of Permanent Impairment* (American Medical Association), *The Manual for Orthopedic Surgeons in Evaluating Permanent Physical Impairment* (American Academy of Orthopedic Surgeons), or in cases not covered by either of these, an impairment rating by any appropriate method used and accepted by the medical community. Additionally, pursuant to T.C.A. Section 50-6-241(b), the new Act provides where an employee is eligible to receive permanent partial disability benefits to unscheduled injuries and the pre-injury employer does not return the employee to employment at a wage equal to or greater than the wage the employee was receiving at the time of injury, then the maximum permanent partial disability award the employee may receive is six times the medical impairment rating determined pursuant to the provisions of the *American Medical Association Guides to the Evaluation of Permanent Impairment* (American Medical Association), *The Manual for Orthopedic Surgeons in Evaluating Permanent Physical Impairment* (American Academy of Orthopedic Surgeons), or in cases not covered by either of these, an impairment rating by an appropriate method used and accepted by the medical community. In making such determination, the Court shall consider all pertinent factors, including lay and expert testimony, employee's age, education, skills and

training, local job opportunities, and capacity to work at types of employment available in claimant's disabled condition.

(12) Pursuant to T.C.A. Section 50-6-241(c) of the new Act, the multipliers established by the above-described sub- sections are intended to be maximum limits. If the Court awards a multiplier of five (5) or greater, then the Court shall make specific findings of fact detailing the reasons for awarding the maximum impairment.

(13) The Plaintiff contends that the portions of T.C.A. Section 50-6-241 which uses the A.M.A. Guides to determine benefits is arbitrary and capricious and "not rational" because the Guides ratings have nothing to do with the inability to work. A worker with a slight impairment from a medical point of view might be completely unable to continue in his trade, while another worker might suffer a much worse injury and yet be able to continue working. The above-described portions of T.C.A. Section 50-6-241, additionally, violate the equal protection clause of the 14th Amendment of the United States Constitution because it unfairly discriminates between workers whose medical problems are recognized by the guides and those whose problems are not (such as mental trauma and chronic pain syndrome).

(14) The above-described statute also violates equal protection in that it provides workers who return to the same employment with less disability than those workers who do not return to the same employment.

(15) Additionally, in cases of permanent total disability as provided under the new Act, specifically

T.C.A. Section 50-6-207(F)(4) provides that disability shall be paid during the period of permanent and total disability until the employee reaches age 65. If a disability, however, occurs after 60, the employee is entitled to 260 weeks of benefits regardless of the employee's age. Thereafter, any compensation benefits are reduced by the amount of any old age insurance benefit payments attributable to the employer contributions under the Social Security Act.

(16) The Plaintiff would show unto the Court that it is arbitrary, irrational, and a violation of equal protection to deny older workers the same benefits as provided to younger workers.

(17) Additionally, T.C.A. Section 50-6-207(F)(4)(A)(iii) provides that attorney fees in contested cases of permanent and total disability shall be calculated upon the first 400 weeks of disability only. Plaintiff contends that this cap is irrational, arbitrary, capricious, illegal and unconstitutional in that there is no similar limit in the statute for employers and insurance companies attorneys. That this distinction violates the equal protection clause of the 14th Amendment of the United States Constitution and Article 1, Section 21 of the Constitution of Tennessee. The Plaintiff would show unto the Court that it is arbitrary and irrational to discourage legal representation for only one side while doing nothing to prohibit the other side from obtaining representation.

PREMISES CONSIDERED, the Plaintiff demands:

1. That proper process issue and be served upon the Defendants requiring them to answer this

Complaint within the time required by law, but not under oath, their oaths being waived.

2. That upon the hearing of this cause, the Court determine the degree of the Plaintiff's disability, the nature and extent of the same, and award her such benefits as she is justly entitled under the provisions of the Workers' Compensation Laws for the State of Tennessee.

3. That the Plaintiff be granted a declaratory judgment holding such parts of the "Workers' Compensation Reform Act of 1992" as the Court finds unconstitutional.

4. The Plaintiff demands such further and general relief to which she may be entitled under the law and evidence.

ALICE SUE BROWN

BY:_____

David H. Dunaway, No. 0491
Attorney for Plaintiff
100 S. Fifth Street
Post Office Box 231
LaFollette, Tennessee 37766

LaFollette: (615) 562-7085
Knoxville: (615) 524-3670

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and exact copy of the foregoing has been served on all interested counsel by placing the same in the United States mail with sufficient postage thereon to insure delivery.

Dated this ___ day of October, 1993.

_____

David H. Dunaway

APPENDIX F

IN THE CHANCERY COURT FOR CAMPBELL COUNTY, TENNESSEE AT JACKSBORO

ALICE SUE BROWN,

Plaintiff, CIVIL ACTION NO: 13,417

vs.

CAMPBELL COUNTY BOARD OF EDUCATION, LARRY BRINTON, JR., DIRECTOR OF THE DIVISION OF WORKERS' COMPENSATION, TENNESSEE DEPARTMENT OF LABOR, SECOND INJURY FUND, STATE OF TENNESSEE, and CHARLES BURSON, ATTORNEY GENERAL FOR THE STATE OF TENNESSEE,

Defendants.

AMENDED COMPLAINT

Comes the Plaintiff, by and through her attorney, pursuant to Rule 15 of the Tennessee Rules of Civil Procedure, and would amend her Complaint and show unto the Court the following:

(1) The Plaintiff is and at all times mentioned herein was a citizen and resident of Campbell County, Tennessee.

(2) That the Defendant, Campbell County Board of Education, is and at all times mentioned herein was the Plaintiff's employer. The Defendant, Larry Brinton, Jr., is the Director of the Division of Workers' Compensation for the Tennessee Department of Labor, Administrator of the Second Injury Fund, and who may be served through the office of the Attorney General for the State of Tennessee, 450 James Robertson Parkway, Nashville, Tennessee. The Defendant, State of Tennessee, is being made a party to this cause of action with regard to the validity and/or constitutionality of certain portions of the Workers' Compensation Reform Act for 1992, and the State of Tennessee is being made a party pursuant to Rule 4 of the Tennessee Rules of Civil Procedure. Additionally, the Defendant, Charles Burson, is being made a party to this cause of action due to the fact that Charles Burson is the Attorney General for the State of Tennessee and the validity and/or constitutionality of various statutes of the workers' compensation laws for the State of Tennessee as provided in Section 50-6-101, et seq of the Tennessee Code Annotated are being drawn into question. The Defendant, State of Tennessee, may be served through the Attorney General for the State of Tennessee, 450 James Robertson Parkway, Nashville, Tennessee. The Defendant, Charles Burson, Attorney General for the State of Tennessee, may be served at 450 James Robertson Parkway, Nashville, Tennessee, pursuant to Rule 4 of the Tennessee Rules of Civil Procedure.

(3) That this is a proceeding under and by virtue of the Workers' Compensation Laws for the State of Tennessee for benefits as provided in Section 50-6-101 et seq of the Tennessee Code Annotated.

(4) The Defendant, Larry Brinton, Jr., Director of the Division of Workers' Compensation, Tennessee Department of Labor, is being made a party to this cause of action pursuant to claims which the Plaintiff has from the State of Tennessee "Second Injury Fund".

(5) That on or about October 6, 1992, while employed in the course and scope of her employment as a cook for the Defendant, Campbell County Board of Education, the Plaintiff was trying to open a steamer when she suddenly injured her neck, upper back, left shoulder, and left arm while working at the Jellico Elementary School. This industrial accident occurred in Campbell County, Tennessee.

(6) That as a result of the aforesaid industrial accident which arose out of and in the course and scope of the Plaintiff's employment, the Plaintiff was rendered disabled to work and earn wages. The Plaintiff has also incurred certain medical expenses.

(7) The Plaintiff would further show to the Court that prior to October 6, 1992, the Plaintiff had previously sustained permanent disability of which her employer, Campbell County Board of Education, was aware, and as a result of the Plaintiff's previous disability and the above described injuries, the Plaintiff has sustained additional disability.

(8) That granting the Plaintiff workers' compensation benefits in a lump sum would be in the Plaintiff's best interest and the Plaintiff has the ability to wisely manage and control a lump sum award. Alternatively, the Plaintiff would request that her attorney fees be paid in a lump sum.

(9) Additionally, the Plaintiff brings this action as a challenge to the constitutionality and legality of the "Workers' Compensation Reform Act of 1992" which emphasizes non-adversarial, informal dispute resolution as an alternative to litigation, attempts to control increasing medical costs by authorizing the creation of a system of case management and review of utilization and quality of medical services, places a cap on the permanent partial disability rating which an employee may receive unless certain circumstances are present, provides for permanent total disability benefits to age 65, raises the maximum weekly benefits to 100 percent of the state average weekly wage over a six year period, and authorizes the creation of a state workers' compensation insurance fund.

(10) The Plaintiff urges that certain portions of the "Workers' Compensation Reform Act of 1992" be declared invalid and/or unconstitutional.

(11) The "Workers' Compensation Reform Act of 1992," more particularly at T.C.A. Section 50-6-241(a)(1), provides for injuries arising on or after August 1, 1992, and in cases where an injured employee is eligible to receive permanent partial disability benefits for unscheduled injuries, and where an employee returns to employment at a wage equal to or greater than the wage the employee was receiving at the time of the injury, the

maximum permanent partial disability award that the employee may receive is two and one-half times the medical impairment rating, determined pursuant to the provisions of the *American Medical Association Guides to the Evaluation of Permanent Impairment* (American Medical Association), *The Manual for Orthopedic Surgeons in Evaluating Permanent Physical Impairment* (American Academy of Orthopedic Surgeons), or in cases not covered by either of these, an impairment rating by any appropriate method used and accepted by the medical community. Additionally, pursuant to T.C.A. Section 50-6-241(b), the new Act provides where an employee is eligible to receive permanent partial disability benefits to unscheduled injuries and the pre-injury employer does not return the employee to employment at a wage equal to or greater than the wage the employee was receiving at the time of injury, then the maximum permanent partial disability award the employee may receive is six times the medical impairment rating determined pursuant to the provisions of the *American Medical Association Guides to the Evaluation of Permanent Impairment* (American Medical Association), *The Manual for Orthopedic Surgeons in Evaluating Permanent Physical Impairment* (American Academy of Orthopedic Surgeons), or in cases not covered by either of these, an impairment rating by an appropriate method used and accepted by the medical community. In making such determination, the Court shall consider all pertinent factors, including lay and expert testimony, employee's age, education, skills and training, local job opportunities, and capacity to work at types of employment available in claimant's disabled condition.

(12) Pursuant to T.C.A. Section 50-6-241(c) of the new Act, the multipliers established by the above-

described sub- sections are intended to be maximum limits. If the Court awards a multiplier of five (5) or greater, then the Court shall make specific findings of fact detailing the reasons for awarding the maximum impairment.

(13) The Plaintiff contends that the portions of T.C.A. Section 50-6-241 which uses the A.M.A. Guides to determine benefits is arbitrary and capricious and "not rational" because the Guides ratings have nothing to do with the inability to work. A worker with a slight impairment from a medical point of view might be completely unable to continue in his trade, while another worker might suffer a much worse injury and yet be able to continue working. The above-described portions of T.C.A. Section 50-6-241, additionally, violate the equal protection clause of the 14th Amendment of the United States Constitution because it unfairly discriminates between workers whose medical problems are recognized by the guides and those whose problems are not (such as mental trauma and chronic pain syndrome).

(14) The above-described statute also violates equal protection in that it provides workers who return to the same employment with less disability than those workers who do not return to the same employment.

PREMISES CONSIDERED, the Plaintiff demands:

1. That proper process issue and be served upon the Defendants requiring them to answer this Complaint within the time required by law, but not under oath, their oaths being waived.

2. That upon the hearing of this cause, the

Court determine the degree of the Plaintiff's disability, the nature and extent of the same, and award her such benefits as she is justly entitled under the provisions of the Workers' Compensation Laws for the State of Tennessee.

3. That the Plaintiff be granted a declaratory judgment holding such parts of the "Workers' Compensation Reform Act of 1992" as the Court finds unconstitutional.

4. The Plaintiff demands such further and general relief to which she may be entitled under the law and evidence.

ALICE SUE BROWN

BY:_____

David H. Dunaway, No. 0491
Attorney for Plaintiff
100 S. Fifth Street
Post Office Box 231
LaFollette, Tennessee 37766
LaFollette: (615) 562-7085
Knoxville: (615) 524-3670

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and exact copy of the foregoing has been served on all interested counsel by placing the same in the United States mail with sufficient postage thereon to insure delivery.

Dated this ___ day of August, 1994.

_____

David H. Dunaway

APPENDIX G

IN THE CHANCERY COURT FOR CAMPBELL COUNTY, TENNESSEE AT JACKSBORO

ALICE SUE BROWN,

Plaintiff, CIVIL ACTION NO: 10,418

vs.

CAMPBELL COUNTY BOARD OF EDUCATION AND LARRY BRINTON, JR., DIRECTOR OF THE DIVISION OF WORKERS' COMPENSATION, TENNESSEE DEPARTMENT OF LABOR, SECOND INJURY FUND,

Defendants.

COMPLAINT

Comes the Plaintiff and would show unto the Court the following:

(1) The Plaintiff is and at all times mentioned herein was a citizen and resident of Campbell County, Tennessee.

(2) That the Defendant, Campbell County Board of Education, is and at all times mentioned herein was the Plaintiff's employer. The Defendant, Campbell County Board of Education, is a governmental entity with offices at Jacksboro, Tennessee, and process may be served on its managing agent, Mr. Arlis Chapman, Superintendent of Schools of Campbell County, pursuant to Rule 4 of the Tennessee Rules of Civil Procedure. The Defendant, Larry Brinton, Jr., is the Director of the Division of Workers' Compensation for the Tennessee Department of Labor, Administrator of the Second Injury Fund, and who may be served through the office of the Attorney General for the State of Tennessee, 450 James Robertson Parkway, Nashville, Tennessee by out of county process through the Davidson County Sheriff, Nashville, Tennessee.

(3) That this is a proceeding under and by virtue of the Workers' Compensation Laws for the State of Tennessee for benefits as provided in Section 50-6-101 et seq of the Tennessee Code Annotated.

(4) The Defendant, Larry Brinton, Jr., Director of the Division of Workers' Compensation, Tennessee Department of Labor, is being made a party to this cause of action pursuant to claims which the Plaintiff has from the State of Tennessee "Second Injury Fund".

(5) That during the latter part of October 1992, while employed in the course and scope of her employment as a cook, the Plaintiff was in a stock room at the Jellico Elementary School taking inventory when she suddenly slipped and fell, sustaining serious and disabling injuries to her back, right hip, right leg, and various other parts of her body. This industrial accident occurred in

Campbell County, Tennessee.

(6) That as a result of the aforesaid industrial accident which arose out of and in the course and scope of the Plaintiff's employment, the Plaintiff was rendered disabled to work and earn wages. The Plaintiff has also incurred certain medical expenses.

(7) The Plaintiff would further show to the Court that prior to the latter part of October, 1992, the Plaintiff had previously sustained permanent disability of which her employer, Campbell County Board of Education, was aware, and as a result of the Plaintiff's previous disability and the above described injuries, the Plaintiff believes that she has sustained additional disability and has become or will become permanently and totally disabled from any gainful occupation.

(8) That granting the Plaintiff workers' compensation benefits in a lump sum would be in the Plaintiff's best interest and the Plaintiff has the ability to wisely manage and control a lump sum award.

PREMISES CONSIDERED, the Plaintiff demands:

1. That proper process issue and be served upon the Defendants requiring them to answer this Complaint within the time required by law, but not under oath, their oaths being waived.

2. That upon the hearing of this cause, the Court determine the degree of the Plaintiff's disability, the nature and extent of the same, and award her such benefits

as she is justly entitled under the provisions of the Workers' Compensation Laws for the State of Tennessee.

3. The Plaintiff demands such further and general relief to which she may be entitled under the law and evidence.

ALICE SUE BROWN

BY:_____

David H. Dunaway, No. 0491
DAVID H. DUNAWAY & ASSOCIATES
Attorney for Plaintiff
100 S. Fifth Street
Post Office Box 231
LaFollette, Tennessee 37766
LaFollette: (615) 562-7085
Knoxville: (615) 524-3670

COST BOND

We acknowledge ourselves sureties for all costs in this cause not to exceed Five Hundred Dollars ($500.00).

_____

_____

APPENDIX H

IN THE CHANCERY COURT
FOR CAMPBELL COUNTY, TENNESSEE
AT JACKSBORO

ALICE SUE BROWN,

Plaintiff,

vs.
CIVIL ACTION

NO.: 10,417

CAMPBELL COUNTY BOARD OF EDUCATION,

Defendant.

COMPLAINT

Comes the Plaintiff and would show unto the Court the following:

(1) The Plaintiff is and at all times mentioned herein was a citizen and resident of Campbell County, Tennessee.

(2) That the Defendant, Campbell County Board of Education, is and at all times mentioned herein was the Plaintiff's employer. The Defendant, Campbell County Board of Education, is a governmental entity with offices at Jacksboro, Tennessee, and process may be served on its managing agent, Mr. Arlis Chapman, Superintendent

of Schools of Campbell County, pursuant to Rule 4 of the Tennessee Rules of Civil Procedure.

(3) That this is a proceeding under and by virtue of the Workers' Compensation Laws for the State of Tennessee for benefits as provided in Section 50-6-101 et seq. of the Tennessee Code Annotated.

(4) That on or about October 6, 1992, while employed in the course and scope of her employment as a cook, the Plaintiff was trying to open a steamer when she suddenly injured her neck and upper back while working at the Jellico Elementary School. This industrial accident occurred in Campbell County, Tennessee.

(5) That as a result of the aforesaid industrial accident which arose out of and in the course and scope of the Plaintiff's employment, the Plaintiff was rendered disabled to work and earn wages. The Plaintiff has also incurred medical expenses.

(6) That granting the Plaintiff workers' compensation benefits in a lump sum would be in the Plaintiff's best interest and the Plaintiff has the ability to wisely manage and control a lump sum award.

PREMISES CONSIDERED, the Plaintiff demands:

(1) That proper process issue and be served upon the Defendant, requiring it to answer this Complaint within the time required by law, but not under oath, its oath being waived.

(2) Upon the hearing of this cause, the Court determine the degree of the Plaintiff's disability, the nature and extent of the same, and award her such benefits as she is justly entitled under the provisions of the workers' compensations laws for the State of Tennessee.

(3) The Plaintiff demands such further and general relief to which she may entitled under the law and evidence.

ALICE SUE BROWN

BY:_____
David H. Dunaway, No. 0491
DAVID H. DUNAWAY & ASSOCIATES
Attorney for Plaintiff
100 S. Fifth Street
LaFollette, TN 37766-0231
LaFollette: 615/562-7085
Knoxville: 615/524-3670

COST BOND

We acknowledge ourselves sureties for all costs in this cause not to exceed five hundred dollars ($500.00).

_____

_____

APPENDIX I

Tenn. Code Ann. § 50-6-241(a)(1),(b),(c)(Supp. 1995), provides as follows:

> (a)(1) For injuries arising on or after August 1, 1992, in cases where an injured employee is eligible to receive any permanent partial disability benefits, pursuant to [T.C.A.] § 50-6-207(3)(A)(i) and (F), and the pre-injury employer returns the employee to employment at a wage equal to or greater than the wage the employee was receiving to the time of injury, the maximum permanent partial disability award that the employee may receive is two and one-half (2½) time the medical impairment rating determined pursuant to the provisions of the American Medical Association Guides to the Evaluation of Permanent Impairment (American Medical Association), the Manual for Orthopedic Surgeons in Evaluating Permanent Physical Impairment (American Academy of Orthopedic Surgeons), or in cases not covered by either of these, an impairment rating by any appropriate method used and accepted by the medical community. In making determinations, the court shall consider all pertinent factors including lay and expert testimony, employee's age, education, skills and training, local job opportunities, and capacity to work at types of employment available in claimant's disabled condition.

* * *

(b) Subject to factors provided in subsection (a) of this section, in cases for injuries on or after August 1, 1992, where an injured employee is eligible to receive permanent partial disability benefits . . . and the pre-injury employer does not return the employee to employment at a wage equal to or greater than the wage the employee was receiving at the time of injury, the maximum permanent partial disability award that the employee may receive is six (6) times the medical impairment rating determined pursuant to the provisions of the American Medical Association Guides to the Evaluation of Permanent Impairment (American Medical Association), the Manual for Orthopedic Surgeons in Evaluating Permanent Physical Impairment (American Academy of Orthopedic Surgeons), or in cases not covered by either of these, an impairment rating by any appropriate method used and accepted by the medical community. In making such determinations, the court shall consider all pertinent factors, including lay and expert testimony, employee's age, education, skills and training, local job opportunities, and capacity to work at types of employment available in claimant's disabled condition.

(c) The multipliers established by subsections (a) and (b) are intended to be maximum limits. If he court awards a multiplier of five (5) or greater, then the court shall make specific findings of fact detailing the reasons for awarding the maximum impairment. In making such determinations, the court shall consider all pertinent factors, including lay and expert testimony,

employee's age, education, skills and training, local job opportunities, and capacity for work at types of employment available in claimant's disabled condition.

APPENDIX J

Tenn. Code Ann. § 50-6-242 (Supp. 1994), provides as follows:

> Notwithstanding any provision of this chapter to the contrary, the trial judge may award employees permanent partial disability benefits, not to exceed four hundred (400) weeks, in appropriate cases where permanent medical impairment is found and the employee is eligible to receive the maximum disability award under § 50-6-241(a)(2) or (b). In such cases the court, on the date of maximum medical improvement, must make a specific documented finding, supported by clear and convincing evidence, of at least three (3) of the following four (4) items:
>
> (1) The employee lacks a high school diploma or general equivalency diploma or the employee cannot read or write on a grade eight (8) level;
>
> (2) The employee is age fifty-five (55) or older;
>
> (3) The employee has no reasonably transferable job skills from prior vocational background and training; and
>
> (4) the employee has no reasonable employment opportunities available locally considering the employee's permanent medical condition.

APPENDIX K

Title 42 U.S.C. § 12101(2), provides:

> Disability. The term "disability" means, with respect to an individual--
>
> (A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;
>
> (B) a record of such an impairment; or
>
> (C) being regarded as having such an impairment.

APPENDIX L

Title 42 U.S.C. § 12131(2), provides:

> The term "qualified individual with a disability" means an individual with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.

APPENDIX M

Title 42 U.S.C. § 12132, provides:

> Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participating in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.